

O19MFED1-CORRECTED

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

3 FEDERAL TRADE COMMISSION,

4 Plaintiff,

5 v.

20 CV 4432(JSR)

6 Trial

7 JONATHAN BRAUN, et al,

8 Defendants.

9 New York, N.Y.  
10 January 9, 2024  
10:15 a.m.

11 Before:

12 HON. JED S. RAKOFF,

13 District Judge  
14 -and a Jury-

14 APPEARANCES

15 FEDERAL TRADE COMMISSION  
16 Attorneys for Plaintiff  
17 BY: GREGORY ASHE  
18 JULIA HEALD

19 AIDALA BERTUNA & KAMINS PC  
20 Attorneys for Defendants  
21 BY: MICHAEL DIBENEDETTO

22 LAW OFFICES OF BARATTA, BARATTA & AIDALA  
23 Attorneys for Defendants  
24 BY: JOSEPH BARATTA

25 Also Present:

Molly Smith, FTC Paralegal  
Ken Kotarski, FTC Trial Tech  
Emma Barbacci, Defense Paralegal

O19MFED1-CORRECTED

(Trial resumed; jury not present)

THE COURT: I'm sorry. The other matter I had took longer than I thought.

(Jury present).

THE COURT: Good morning, ladies and gentlemen. Thank you so much for your promptness.

I have left with each of you now a copy of what I read to you yesterday. These were the facts that were found at the earlier phase of this case, which you may find helpful in assessing the three questions you are going to answer. These are the findings that established that the defendant was liable for both overcollecting and for underpayment.

But you may recall, that establishes liability but it doesn't establish how much. That's your job. Just to repeat, although I know you know this by now, there are basically three things you need to consider.

First is how much is owed to the persons, the borrowers who were victimized; secondly, whether or not Mr. Braun acted intentionally and purposely and with a knowledge that he was violating the law when he made or helped others to make these misrepresentations; and, third, if, and only if, you find that he did act with that intent, then what kind of monetary penalty should be imposed on top of the amounts that are owed to the borrowers.

Those are the three questions on what I have just

019MFED1

Kwok - Direct

1 given to you, which you can take back with you into the jury  
2 room. I think will be helpful in getting the overall context.

3 Let's continue.

4 ELIZABETH KWOK, resumed.

5 DIRECT EXAMINATION

6 BY MS. HEALD:

7 Q. Good morning, Ms. Kwok.

8 A. Good morning.

9 Q. I'd like to start by showing you what's been marked for  
10 identification as FTCX-59.

11 Could you please take a look and let me know if you  
12 recognize this document?

13 A. I do.

14 Q. What is this?

15 A. This is an email exchange between John Braun and Marcella  
16 Rabinovich. It is an email from October 18, 2017. We received  
17 this in the course of our investigation from Richmond Capital.

18 MS. HEALD: Your Honor, I would like to offer FTC 59  
19 into evidence.

20 THE COURT: Any objection?

21 MR. DiBENEDETTO: No objection.

22 THE COURT: Received.

23 (Plaintiff's Exhibit 59 received in evidence)

24 Q. Ms. Kwok, could you please begin by reading the subject  
25 line for this email.

019MFED1

Kwok - Direct

1 A. Yes. The subject line is: Re: Ever heard of this,  
2 question mark.

3 Q. Next could you please read the second email from the top.  
4 There is a time stamp of October 18, 2017 at 4:09 p.m. from  
5 John Braun.

6 A. From 4:09 is from Marcella.

7 Q. Excuse me. We will do the time stamp 4:56.

8 A. Yes. At 4:56, John Braun wrote: So you think we should  
9 enroll and get the software and utilize it while underwriting?

10 Q. Next, can you please read the email above that, the top  
11 email in the chain.

12 A. Yes. 4:58, Marcella Rabinovich wrote: It could help.  
13 It's like clear but may more advanced. You should request a  
14 free trial. Well, Rob should request a free trial or to see if  
15 someone would come and show us how it works.

16 Q. Next I'd like to show you what's been marked for  
17 identification FTCX-75.

18 Ms. Kwok, do you recognize this document?

19 A. I do.

20 Q. What is it?

21 A. It is a transcript from a hearing with Jonathan Braun held  
22 by the New York Attorney General's office.

23 Q. Have you seen this document before?

24 A. I have. We received this in the course of our  
25 investigation.

O19MFED1

Kwok - Direct

1 MS. HEALD: Your Honor, I would like to offer FTC  
2 Exhibit 75 into evidence.

3 MR. DiBENEDETTO: No objection.

4 THE COURT: Received.

5 (Plaintiff's Exhibit 75 received in evidence)

6 Q. Ms. Kwok, if you could please look at the page marked  
7 FTC-75-6. I would ask you to read the lines 13 to 15.

8 A. Starts with: Q. Did you work at any time with Yellowstone  
9 Capital? A. As a broker, but not at the company.

10 Q. Ms. Kwok, are you familiar with Yellowstone Capital?

11 A. I am.

12 Q. Can you please describe your familiarity with it.

13 A. Yes. I was an investigator on a matter at the FTC against  
14 Yellowstone Capital where we investigated claims --

15 MR. DiBENEDETTO: Your Honor, I am going to object to  
16 this line of questioning.

17 THE COURT: Sustained.

18 Q. Turning to the next page -- it's not the next page.

19 Turning to the page marked FTCX-75-10, could you please read  
20 lines 4 to 11.

21 A. Q. Were you advising Giardina and Gregg what the terms --  
22 what the amounts should be? A. Again, Giardina does the bank.  
23 I do underwriting and deal with the broker, which is who I  
24 dealt with on this file, and Gregg does the input of the  
25 payments. So as far as talking about terms, it's not about the

019MFED1

Kwok - Direct

1 terms; it's about the actual deal, you know, specifics.

2 Q. Next could you please turn to the page 75-12. Here could  
3 you please read the lines 8 through 16.

4 A. Q. But the costs, including the underwriting cost to  
5 Stacie Motyl, that was covered by the ACH fee? A. Again, each  
6 deal has a million -- look. As you can see through emails, has  
7 multiple people working it, right? So nobody is working for  
8 free. This is not let's like do the world a big favor and work  
9 and for free voluntary work. You're working for a job, so the  
10 expense is offset by whatever.

11 Q. Next on the page 75-14, could you please read starting at  
12 line 11 and through the end of the page.

13 A. Q. Let me ask you a sort of general -- a few more specific  
14 questions but one general question I do want to ask. If  
15 Giardina or Reich or Gregg or anyone at Richmond, RAM or  
16 Viceroy were to say, I didn't know what was going on at the  
17 company, John Braun handled everything and is responsible for  
18 any problems that we had, would be your answer to that? A.  
19 That I was heavily involved in just about every deal that  
20 funded, and I was there five days a week and from day one.  
21 Michelle was not. Rob was an owner. He was not. As I said,  
22 he was there three days a week. I was probably the only one  
23 there five days a week from day one ground zero until the  
24 unfortunate turn of events.

25 Q. Ms. Kwok, I would now like to show you what's been marked

019MFED1

Kwok - Direct

1 for identification as FTCX-44.

2 Ms. Kwok, do you recognize this document?

3 A. I do.

4 Q. What is this?

5 A. These are merchant agreements that we received in the  
6 course of our investigation from Richmond Capital Group, and  
7 they are the contracts between Richmond Capital Group and  
8 particular merchants.

9 MS. HEALD: Your Honor, I would like to offer FTC  
10 Exhibit 44 into evidence.

11 MR. DiBENEDETTO: No objection.

12 THE COURT: Received.

13 (Plaintiff's Exhibit 44 received in evidence)

14 Q. Ms. Kwok, how did you use the documents that are shown in  
15 FTC Exhibit 44?

16 A. So these --

17 MR. DiBENEDETTO: Objection. Leading.

18 THE COURT: No. I think that's not leading.  
19 Overruled.

20 A. These are the contracts between Richmond Capital Group and  
21 merchants that were identified in the random sampling that Dr.  
22 McAlvanah conducted, and we reviewed each of these contracts  
23 and pulled out particular pieces of information into  
24 spreadsheets for Dr. McAlvanah. I created two different  
25 spreadsheets for his analysis. The first pulled out three

019MFED1

Kwok - Direct

1 pieces of information. The first is the total purchase price,  
2 which is the amount of money that the merchant was told that  
3 they were receiving from Richmond Capital Group. The second is  
4 the total purchased amount, which is the total amount that  
5 Richmond Capital Group was to be paid back. And the third is  
6 the daily amount, which is the amount that Richmond Capital  
7 Group would withdraw from the merchant's bank account on a  
8 daily basis.

9 And then the second spreadsheet that we created pulled  
10 out three additional pieces of information. The first is the  
11 total purchase price, which is the amount that the merchant was  
12 to receive, the second is the origination fee, and the third is  
13 the ACH fee.

14 Q. Did the case team look at documents from any other sources  
15 as part of its work on the random sample?

16 A. We did. We looked at bank account records for -- from  
17 Empire State Bank for Richmond Capital Group in order to see  
18 the amount of money that was transferred to merchants, and then  
19 we also looked at the payment processing records from Actum  
20 Processing group for Richmond Capital accounts to determine the  
21 amount of money that was transferred to Richmond Capital Group  
22 from merchants.

23 Q. After you identified that information, what did you do with  
24 it?

25 A. We provided that information to Dr. McAlvanah.



019MFED1

Kwok - Direct

1 THE COURT: So if I understand it, you were the person  
2 who was responsible for getting the underlying data that he  
3 then used for his report?

4 THE WITNESS: That's correct.

5 THE COURT: So with respect to each of the accounts --  
6 withdrawn.

7 My understanding from his testimony, there was  
8 something just a little less than 1500 accounts that were  
9 ultimately reviewed?

10 THE WITNESS: So we started with a list of accounts  
11 from the payment processing company, and they provided us with  
12 1500 -- a little bit less. As you said, 1500. But Dr.  
13 McAlvanah then pulled a sample from that listing.

14 THE COURT: That's what I wanted to explore.

15 With respect to the ones that he asked you to explore,  
16 how long did it take to get the data he wanted for any single  
17 account?

18 THE WITNESS: It was a very laborious process. It  
19 requires us to manually -- so he provided us an initial list  
20 of, I believe, a hundred merchants to search through the  
21 records of contracts. And these are all -- as you can see,  
22 they are scans of contracts, and so you have to manually search  
23 through your whole data set. It was quite a long time ago that  
24 I did this work, so I can't tell you with specificity how long  
25 overall, but it probably took me a couple of weeks to find the

019MFED1

Kwok - Direct

1 initial set or to search those first set.

2 THE COURT: If most of the time, or at least a  
3 meaningful part of the time, was simply having to search  
4 through the whole set to find the ones that you wanted, why  
5 didn't you simply provide him the information for the entire  
6 1499, or whatever the exact figure was, as opposed to a  
7 hundred?

8 THE WITNESS: So the documents, the contract  
9 documents, were not labeled or organized in any particular  
10 fashion, and we actually don't necessarily have a contract for  
11 every single account identified by the payment processing  
12 company because these are coming from different sources. We  
13 got the contracts through Richmond Capital Group, but we have  
14 the data from the payment processing company.

15 And so we started with the sample because Dr.  
16 McAlvanah had his own work, and I was pulling these documents  
17 for him. But it was a manual process. So there was not a  
18 one-to-one match between what was identified as a merchant and  
19 what contract documents we had in our possession.

20 THE COURT: So if I understand what you are saying,  
21 you are saying that if it had been done for the entire 1499 or  
22 whatever, as opposed to the sample, not only would it have  
23 been -- require a great deal of time, but in some cases it  
24 would have been very difficult because you would have had to  
25 reach out for additional data that you didn't have yet.

019MFED1

Kwok - Cross

1 THE WITNESS: That is correct.

2 THE COURT: Go ahead, counsel.

3 MS. HEALD: Thank you, your Honor. I have no further  
4 questions for Ms. Kwok.

5 THE COURT: Cross-examination.

6 CROSS-EXAMINATION

7 BY MR. DiBENEDETTO:

8 Q. Good morning, Ms. Kwok.

9 A. Good morning.

10 Q. Can you remind me how long you've been an investigator with  
11 the Federal Trade Commission?

12 A. I was an investigator at the Federal Trade Commission  
13 beginning in June 2013, and I permanently switched to my  
14 current role as an assistant director in March of 2022.

15 Q. And do you recall the year that you were assigned to this  
16 case?

17 A. Not with specificity.

18 Q. Isn't it correct that you were assigned to investigate RCG  
19 Advances, Mr. Giardina, Mr. Braun, RAM Capital Funding, and  
20 Mr. Reich?

21 A. Can you repeat the first part of your question.

22 Q. Was it your job to investigate the defendants in this case?

23 A. Yes.

24 Q. What does an investigation encompass with the Federal Trade  
25 Commission?

019MFED1

Kwok - Cross

1 A. So, generally speaking, there are claims or allegations,  
2 complaints of unfair or deceptive acts and practices, and I use  
3 a variety of Internet search engines, databases, other  
4 investigative tools to look through and analyze records, such  
5 as bank data, website registration data, all those sorts of  
6 things, records that we received directly from defendants or  
7 third parties, and I look for indicators of fraudulent  
8 activity.

9 Q. Who speaks to the consumers?

10 A. Typically, me. Sometimes we have paralegals who work on  
11 the matter.

12 Q. Who obtains copies of the consumer complaints initially?

13 A. Sorry. Can you repeat that.

14 Q. Sure. Who initially obtains complaints of the consumer  
15 complaints?

16 A. We get consumer complaints from a variety of sources. Is  
17 there a specific place that you are referring to?

18 Q. News in general. If a consumer complains to the Federal  
19 Trade Commission, where does that complaint go?

20 A. So we have a hotline which you can either call or submit  
21 online. It's called Consumer Sentinel. So consumers can  
22 submit complaints there. But we also get complaints through  
23 other sources fed into that same database, such as places like  
24 Better Business Bureau, if you were to complain to your local  
25 state attorney.

019MFED1

Kwok - Cross

1 Q. Did you ever speak to the consumers who filed complaints?

2 A. I did.

3 Q. Do you remember how many?

4 A. I apologize. I don't.

5 Q. Did you ever look at the tax records for RCG Advances?

6 A. I believe, yes.

7 Q. Do you recall ever seeing Mr. Braun's name on the tax  
8 returns for RCG?

9 A. I can't say with certainty right now.

10 Q. You were the investigator in this case, correct?

11 A. Yes.

12 Q. As it stands today, you don't recall whether or not  
13 Mr. Braun's name was on the tax returns for RCG, correct?

14 A. I don't, not right in this moment.

15 Q. Did you review the tax return for RAM Capital Funding?

16 A. I believe, yes.

17 Q. Do you recall Mr. Braun's name on those tax returns?

18 A. Not in this moment, no.

19 Q. You previously testified that Mr. McAlvanah gave you the  
20 records of the consumer cases, right, to pull the cases?

21 A. He selected names. He did not provide me with records.

22 Q. Do you know if Mr. McAlvanah ever reviewed MCA agreements?

23 A. I can't speak to Mr. McAlvanah's work.

24 Q. Did you ever give him copies of the MCA agreements to  
25 review?

019MFED1

Kwok - Cross

1 A. He had access to them, yes.

2 Q. He did have access to them?

3 A. Yes. We work in the same agency, so on the same matter, so  
4 he would have access.

5 Q. Would it be surprising to you --

6 THE COURT: No, no, no. No question beginning with  
7 the words "would it be surprising to you" is ever allowed  
8 because it's really a form of counsel testifying.

9 MR. DiBENEDETTO: Can we pull up what was marked as  
10 Plaintiff's Exhibit 38. I'm sorry. Can we go to 38-5. Thank  
11 you.

12 Q. Ms. Kwok, do you remember reviewing these documents with  
13 the FTC's attorney?

14 A. Do you mean in court?

15 Q. Yes, in court.

16 A. Yes.

17 Q. What is this document again?

18 A. So this is part of the merchant agreement between -- I'm  
19 sorry. This is a payment processing agreement with Actum  
20 Processing.

21 Q. Do you know what Actum Processing is?

22 A. It's a payment processing company.

23 MR. DiBENEDETTO: If we go to 38-6, please.

24 Q. In 38-6, do you see on the fourth box, it says contact  
25 information?

019MFED1

Kwok - Cross

1 A. I see the one underneath principal/officers.

2 Q. Yes. Whose name is listed?

3 A. In which field?

4 Q. Under the contact information, the fourth box.

5 A. I don't see a field -- I'm sorry. The one above  
6 principals, the primary contact is Robert Giardina.

7 Q. The box underneath that, where it says principal officers  
8 of the company, whose name is listed on this form?

9 A. In which field?

10 Q. The field below where it says principals/officers of the  
11 company.

12 A. It says principal name. 1. Iron Horse Asset  
13 Management/Robert Giardina. 2. Principal name, RVCNY/Richard  
14 Giardina.

15 Q. I don't believe it says Richard Giardina.

16 A. I apologize. Cardinale. It's not large on here. I  
17 apologize.

18 Q. Who is the authorized signature at the bottom of this page?

19 A. It says Rich Cardinale and Robert Giardina.

20 Q. Whose initials do you believe is at the bottom of this  
21 page?

22 A. It would read to me as RG.

23 Q. Would that indicate Robert Giardina?

24 A. I believe so.

25 MR. DiBENEDETTO: If we can go to 38-7.

019MFED1

Kwok - Cross

1 Q. If you look at the third box down where it says personal  
2 guaranty, could you read the last sentence, please, in that  
3 box.

4 A. The one that begins with I/we?

5 Q. Correct.

6 A. I/we have read, understand, and agree to be bound by the  
7 client services terms and conditions and conditions contained  
8 in the client services application and agreement.

9 Q. Who signed this document?

10 A. It would appear to be Robert Giardina.

11 Q. And the bottom box, where it says client authorization and  
12 agreement to terms and conditions, who is the signer on this  
13 page?

14 A. It says: Client, Richmond Capital Group and name of  
15 authorized signer, Robert Giardina.

16 Q. Whose initials are at the bottom of this page?

17 A. Sorry. The box -- you're saying at the -- it would look to  
18 be RG.

19 MR. DiBENEDETTO: If we could go to 38-8, please.

20 Q. Whose initials are at the bottom of this page?

21 A. It would appear to be RG.

22 MR. DiBENEDETTO: If we could go to 38-9.

23 Q. Whose initials are at the bottom of this page?

24 A. It would appear to be RG.

25 MR. DiBENEDETTO: If we go to 38-10.



019MFED1

Kwok - Cross

1 Q. Do you recall reading into the record section 5.3  
2 yesterday?

3 A. Yes.

4 Q. Whose initials are at the bottom of this page?

5 A. It would appear to be RG.

6 Q. If we go to 38-11, whose initials are at the bottom of this  
7 page?

8 A. It would appear to be RG.

9 Q. If we go to 38-12, whose initials are at the bottom?

10 A. It would appear to be RG.

11 Q. If we go to 38-13, whose initials are at the bottom?

12 A. It would appear to be RG.

13 Q. Would it be fair to say that Mr. Braun's name is not on any  
14 of the Actum applications?

15 A. None that we have reviewed.

16 MR. DiBENEDETTO: If we could please go to Plaintiff's  
17 39-6.

18 Q. Do you recall what this document is, Ms. Kwok?

19 A. Sorry. Did you say 39-6?

20 Q. Yes.

21 A. Sorry. I had a different one on my screen.

22 It's on my screen now.

23 Q. Do you recall what this document is?

24 A. Yes. It is an application page with Thompson Reuters.

25 Q. Who is the email address for the subscriber information?

019MFED1

Kwok - Cross

1 A. Robert@RichmondCapitalGroup.com.

2 Q. Is it fair to say that it is Mr. Giardina?

3 A. Yes.

4 MR. DiBENEDETTO: If we go to 39-7.

5 Q. Can you please read who the company/principal is.

6 A. Name: Robert Giardina.

7 Q. And the title says managing member, correct?

8 A. Correct.

9 MR. DiBENEDETTO: If we go to 39-9, please.

10 Q. See on the bottom where it says authorized representative  
11 for certification?

12 A. I do.

13 Q. Can you please read the name and who signed it.

14 A. Robert Giardina.

15 MR. DiBENEDETTO: If we go to 39-10.

16 Q. Whose email address is listed at the top of this page?

17 A. Robert@RichardCapitalGroup.com.

18 MR. DiBENEDETTO: If we go to 39-11.

19 Q. Who does it say that the company principal is?

20 A. Robert Giardina.

21 MR. DiBENEDETTO: If we go to 39-12.

22 Q. Isn't it correct that Mr. Giardina is the authorized  
23 representative?

24 A. His name is in the printed name field, correct.

25 Q. So is it fair to say that in Plaintiff's 39 nowhere is

O19MFED1

Kwok - Cross

1 Mr. Braun's name mentioned and/or did he sign anything?

2 A. Not on any of the pages we reviewed.

3 Q. Thank you.

4 Where did you maintain the records that you had made  
5 or received during your investigation?

6 A. So anything that was in paper format was in a locked  
7 cabinet in my office, and anything that was electronic is in a  
8 shared network folder on our servers that has limited  
9 permissions to members of the team and other select people at  
10 the agency.

11 Q. Who else had access to these records at the agency?

12 A. It would be anybody that was working directly on the case,  
13 certain members of our office management, and folks like Dr.  
14 McAlvanah.

15 Q. Did you ever discuss your investigation with the New York  
16 Attorney General's office?

17 A. I personally did not.

18 Q. Do you know if anybody in your office did?

19 A. I couldn't say for certain.

20 Q. As you investigated, you reviewed the bank records in this  
21 case, correct?

22 A. Correct.

23 Q. Do you recall who was the owner of the bank account in this  
24 case?

25 A. There were many. I can't say right in this moment who

019MFED1

Kwok - Cross

1 every particular owner was, no.

2 Q. Do you recall seeing Mr. Braun's name on the bank  
3 statements?

4 A. Not right in this moment.

5 Q. You investigated this case, correct?

6 A. Correct.

7 Q. As it stands today, do you recall seeing Mr. Braun's name  
8 on any of the bank statements for RCG, RAM Capital, or Viceroy?

9 A. I worked on this case many years ago at the level where I  
10 was looking at bank records every day. So just in this moment  
11 I could not attest whose name is on what records without  
12 looking at it.

13 Q. You're testifying today, correct?

14 A. Correct.

15 Q. Did you review any documents in preparation for your  
16 testimony?

17 A. A limited number of them.

18 Q. What did you review?

19 A. The things that we have testified to.

20 Q. You testified to bank records. Did you review those?

21 A. I reviewed limited forms of them.

22 Q. So in the limited records that you reviewed, was  
23 Mr. Braun's name on any of those statements?

24 A. Not any of the ones that we have testified to.

25 Q. You also reviewed the merchant cash advance agreements in

019MFED1

Kwok - Cross

1 this case, correct?

2 A. Correct.

3 Q. Do you recall who of the defendants signed those  
4 agreements?

5 A. Not in this moment right now.

6 Q. To the best of your recollection, do you ever recall  
7 Mr. Braun signing any of these agreements?

8 A. Not right in this moment, no.

9 Q. Are you aware that Mr. Reich and Mr. Giardina settled this  
10 matter?

11 A. I believe I am, yes.

12 Q. There is the allegation of overcollecting and underfunding,  
13 correct?

14 A. Correct.

15 Q. To the best of your knowledge, do you know what specific  
16 individual was in charge of debiting the bank accounts of the  
17 consumers?

18 A. No.

19 Q. Do you know who would know that information?

20 A. So can you clarify what you mean by the actual person who  
21 does the debiting?

22 Q. Sure. Whether it's RAM Capital, Viceroy, or RCG, there is  
23 employees of the company, there is Mr. Giardina, there is  
24 Mr. Reich, and there is Mr. Braun, correct?

25 A. Correct.

019MFED1

Kwok - Cross

1 Q. During your investigation, did it become apparent what  
2 specific individual at the company would specifically debit the  
3 account of the consumers?

4 A. Well, the debiting is set up at an automatic level.

5 Q. Do you know who would set up that automatic debiting?

6 A. Not in every single case, no.

7 Q. In the cases that you are aware of, do you know who it was?

8 A. Again, I didn't review that portion of my records, so I  
9 can't say.

10 Q. But you're the investigator in this case, right?

11 A. Correct.

12 Q. And there were complaints of overcollecting and  
13 underfunding, correct?

14 A. Correct.

15 Q. Wouldn't it be your job as the investigator to find out the  
16 source of how that's happening?

17 A. I found evidence that it was happening.

18 Q. How did you find that, though?

19 A. We reviewed complaints from consumers, we reviewed bank  
20 data, we reviewed payment processing records.

21 Q. So you reviewed the complaints of the consumers and then  
22 what?

23 A. Can you clarify?

24 Q. Sure. Did you specifically interview or meet with these  
25 consumers?

O19MFED1

Kwok - Cross

1 A. Some of them.

2 Q. Did you ever ask them who at any of these corporate  
3 defendants they spoke with about giving their debit information  
4 to?

5 A. Most of them sign a form and turn it over, and they have no  
6 idea who is doing what with their information.

7 Q. But, as you sit here today, you are not aware of Mr. Braun  
8 directly inputting any consumer bank account information,  
9 correct?

10 A. Not in this moment, no.

11 Q. As you sit here today, Ms. Kwok, are you aware of anything  
12 that Mr. Braun did in this case specific as to him?

13 A. I am not sure I understand that question.

14 Q. We are here today for alleged damages that Mr. Braun did to  
15 consumers, correct?

16 A. As I understand it, they are here to answer specific  
17 questions about the amount of damages.

18 Q. What specifically as an investigator do you believe  
19 Mr. Braun did in this case?

20 A. I think that would be a rather long answer. Can you  
21 clarify?

22 Q. That's fine. Please answer the question.

23 THE COURT: Although there has been no objection by  
24 plaintiff's counsel, who apparently believes in the  
25 potted-plant approach to being a lawyer, the jury has already

019MFED1

Kwok - Cross

1 been furnished with the Court's undisputed facts to which  
2 Mr. Braun did not object, saying what makes him liable for the  
3 misrepresentations.

4 Now, if what you are asking is what relates to his  
5 intent or lack of intent, that would be a permissible question,  
6 but I think you would need to more narrow it.

7 Q. Are you aware of any intentional acts of Mr. Braun that  
8 harmed consumers?

9 A. Yes.

10 Q. What are those?

11 A. Well, yesterday we reviewed several of the emails which  
12 related to his purposeful actions for, as you termed it,  
13 overcollecting and underfunding.

14 Q. Those were just emails, correct?

15 A. They were emails from Mr. Braun.

16 Q. Correct. But did -- strike that.

17 Those alleged agreements were never shown to you  
18 yesterday, correct?

19 A. Which agreements?

20 Q. Relating to those emails with Stone Capital Funding, those  
21 alleged agreements were never shown to you, correct?

22 A. Not in court.

23 Q. Is it fair to say at this time there is no evidence that  
24 those overcollecting practices actually took place?

25 A. His emails were quite plain that that is the action he



O19MFED1

Kwok - Cross

1 took. They were usually phrased as this is what I did or this  
2 is what we do on a regular basis.

3 Q. If those are the actions that Mr. Braun did, wouldn't that  
4 have been alleged -- strike that.

5 As it stands today, there is nothing -- strike that.

6 The attorneys for the FTC didn't show you any  
7 agreements relating to those emails, correct?

8 A. Not in court today or yesterday.

9 Q. So as it stands today, those were just emails with words on  
10 them, correct?

11 A. They were emails from Mr. Braun explaining what he did or  
12 intended to do.

13 Q. But there is no agreement substantiating those emails,  
14 correct?

15 MS. HEALD: Objection. As your Honor just  
16 explained --

17 THE COURT: I think what counsel is attempting to ask  
18 is, at some point did you match those emails to specific  
19 agreements?

20 THE WITNESS: In some of the instances the emails had  
21 attachments, and we would have attempted to review them.  
22 Again, this was many years ago, so I can't attest with  
23 certainty which ones we were able to locate, but, yes, we would  
24 always make an effort to get all the underlying documents as  
25 part of an email conversation, yes.

019MFED1

Giardina - Direct

1 Q. As it stands today in court, you were never shown any of  
2 those alleged attachments in this case, correct?

3 A. Not in court.

4 MR. DiBENEDETTO: I have no further questions.

5 THE COURT: Any redirect?

6 MS. HEALD: No, your Honor.

7 THE COURT: Thank you so much. You may step down.

8 (Witness excused)

9 THE COURT: Call your next witness, please.

10 MR. ASHE: Your Honor, at this point we are calling  
11 Mr. Robert Giardina to the stand.

12 ROBERT GIARDINA,

13 called as a witness by the Plaintiff,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. ASHE:

17 Q. Good morning, Mr. Giardina. You are a defendant in this  
18 case?

19 A. Yes.

20 Q. The company RCG Advances is also known as Richmond Capital,  
21 who is a defendant in this case?

22 A. Yes.

23 Q. And that you and the company have settled with the FTC in  
24 this case?

25 A. Yes.

019MFED1

Giardina - Direct

1 Q. Under the terms of that settlement, you were required to  
2 cooperate with the FTC by providing truthful testimony?

3 A. Yes.

4 Q. And you are here because of that agreement?

5 A. Yes.

6 Q. Mr. Giardina, when did defendant Braun start working for  
7 Richmond Capital?

8 A. On the advice of counsel I am going to take the Fifth  
9 Amendment.

10 Q. As I understand it, you are now asserting in response to my  
11 question your privilege under the Fifth Amendment of the United  
12 States Constitution?

13 A. Yes.

14 Q. Have you had the opportunity to discuss the subject of the  
15 Fifth Amendment with your counsel prior to your appearance  
16 today?

17 A. Yes.

18 Q. And are you invoking your Fifth Amendment privilege on the  
19 advice of counsel?

20 A. Yes.

21 Q. To invoke the Fifth Amendment you understand you need to  
22 have a reasonable fear of criminal prosecution.

23 Do you understand that?

24 A. Yes.

25 Q. Do you have a reasonable fear?

019MFED1

Giardina - Direct

1 A. Yes.

2 Q. Do you understand that by invoking the Fifth Amendment  
3 privilege against self-incrimination, the Court and the jury  
4 may draw, but are not required to draw, an adverse inference  
5 against Mr. Braun or yourself, that had you answered the  
6 questions fully and truthfully, rather than assert the  
7 privilege, your answers may have intended to incriminate either  
8 yourself or Mr. Braun?

9 A. Yes.

10 Q. In light of that understanding, do you still wish to invoke  
11 the Fifth Amendment?

12 A. Yes.

13 THE COURT: Let me elaborate a little bit on that,  
14 ladies and gentlemen.

15 When someone invokes the Fifth Amendment privilege  
16 against self-incrimination, which they have a constitutional  
17 right to do, while that cannot be held against them in any  
18 criminal case, in a civil case the finders of fact, namely,  
19 you, can, if you wish, draw an adverse inference, that the  
20 reason the person is invoking the Fifth Amendment is because  
21 the answers would tend to expose them to criminal liability.

22 However, while you are not required to draw that  
23 adverse inference, what is being asked here, as I understand  
24 the FTC's position, is that you should draw an inference not  
25 just regarding this gentleman but against Mr. Braun, and you

019MFED1

Giardina - Direct

1 would have a basis for doing so only based on what connections  
2 you found have been established or will be established in the  
3 evidence of this case regarding the inner relationship of  
4 Mr. Braun and this person.

5 In other words, just so we are clear, it's one thing  
6 to draw an inference against the gentleman who is invoking the  
7 Fifth. You don't have to do that, but you can do that. But in  
8 order to go a further step and say the reason he is taking the  
9 Fifth is not only adverse to him but is also a basis to draw an  
10 adverse inference against Mr. Braun, you would have to have a  
11 sufficient basis for assessing their interactions to feel that  
12 that was a reasonable inference.

13 That's entirely up to you, but I just wanted to make  
14 sure that you understood that it's neither here nor there in  
15 terms of this case whether you would draw an adverse inference  
16 against him, because he has already settled with the FTC. He  
17 is not involved in a civil matter. But whether you go a  
18 further step and draw an adverse inference against Mr. Braun is  
19 up to you.

20 Go ahead.

21 MR. ASHE: Thank you.

22 BY MR. ASHE:

23 Q. Just to save time, and with the Court's permission, when I  
24 ask you a question and you want to assert the Fifth, you need  
25 only say Fifth Amendment, if that's acceptable to the Court.

019MFED1

Giardina - Direct

1           Isn't it true that defendant Braun started working at  
2 Richmond Capital at least by March 2014?

3 A. Take the Fifth.

4 Q. Isn't it true that you were the managing member of Richmond  
5 Capital?

6 A. Take the Fifth.

7 Q. If you could speak up just a little bit.

8 A. Sorry.

9 Q. Thank you.

10           Isn't it true that even though you were the managing  
11 member, you considered defendant Braun to be in charge of  
12 Richmond Capital?

13 A. Taking the Fifth.

14 Q. And isn't it true that you took instruction in your  
15 activities from defendant Braun?

16 A. Taking the Fifth.

17 Q. And isn't it true that it is your understanding that  
18 Richmond Capital's other employees also considered defendant  
19 Braun to be the top person in charge of Richmond Capital?

20 A. Taking the Fifth.

21 Q. Isn't it true during his entire time working at Richmond  
22 Capital, defendant Braun was responsible for Richmond Capital's  
23 day-to-day decisions?

24 A. Taking the Fifth.

25 Q. Isn't it true that defendant Braun during his entire time

O19MFED1

Giardina - Direct

1 working at Richmond Capital was responsible and oversaw the  
2 underwriting of merchant cash advances?

3 A. Taking the Fifth.

4 Q. Isn't it true that during his entire working time at  
5 Richmond Capital, defendant Braun was in charge of the funding  
6 of merchant cash advances?

7 A. Taking the Fifth.

8 Q. Isn't it true that during his entire time working at  
9 Richmond Capital, defendant Braun oversaw the collecting on  
10 merchant cash advances?

11 A. Taking the Fifth.

12 Q. I'd like to show you what has already been introduced into  
13 evidence as FTC's Exhibit 38, which are certified documents  
14 from Actum Processing.

15 Isn't it true that Actum Processing was Richmond  
16 Capital's payment processor?

17 A. Taking the Fifth.

18 Q. If you could look at 38-6 and 38-7.

19 Isn't it true that that's your signature at the bottom  
20 of the client services application agreement?

21 A. Taking the Fifth.

22 (Continued on next page)

23

24

25

0195fed2

Giardina - Direct

1 BY MR. ASHE:

2 Q. Isn't it true that defendant Braun provided you this  
3 agreement?

4 A. Taking the Fifth.

5 Q. Isn't it true that defendant Braun instructed you to sign  
6 this agreement?

7 A. Taking the Fifth.

8 Q. Isn't it true that defendant Braun instructed you how to  
9 complete this agreement?

10 A. Taking the Fifth.

11 Q. Isn't it true that these are your initials on the bottom of  
12 page 6 and 7?

13 A. Taking the Fifth.

14 Q. If you could please look at pages 8, 9 and 10; isn't it  
15 true that these are your initials at the bottom of the pages?

16 A. Taking the Fifth.

17 Q. If you could look at the bottom page 38-13, isn't it true  
18 that these are your initials on the bottom of the page?

19 A. Taking the Fifth.

20 Q. Isn't it true that maintaining Richmond Capital's merchant  
21 account was critical for its continued operation?

22 A. Taking the Fifth.

23 Q. I'm going to show you now what has already been introduced  
24 into evidence as FTC's Exhibit 39 which are certified documents  
25 from Thompson Reuters. If you could look specifically at pages



0195fed2

Giardina - Direct

1 39-6 and 39-9? Isn't it true that Richmond Capital regularly  
2 used Clear reports as an integral part of the underwriting  
3 process for merchant cash advances?

4 A. Taking the Fifth.

5 Q. If you could look at the bottom of these pages, isn't it  
6 true that that's your signature at the bottom?

7 MR. DiBENEDETTO: Objection. Leading.

8 A. Taking the Fifth.

9 THE COURT: Hold on. When there is an objection I  
10 have to rule.

11 Overruled.

12 BY MR. ASHE:

13 Q. Isn't it true that defendant Braun provided you this  
14 agreement?

15 A. Taking the Fifth.

16 Q. Isn't it true that defendant Braun instructed you how to  
17 complete this agreement?

18 A. Taking the Fifth.

19 Q. Isn't it true that defendant Braun directed you to sign  
20 this agreement?

21 A. Taking the Fifth.

22 Q. If you would look at pages 39-7 and 39-8, isn't it true  
23 that if you look at page 39-8 and the section Permissible Use  
24 Under Gramm-Leach-Bliley Act -- I apologize, I think it should  
25 have been 39-6, I may have been wrong, I'm not sure whether it

0195fed2

Giardina - Direct

1 is -- let's just say isn't it true that defendant Braun  
2 directed you how to complete this document?

3 A. Taking the Fifth.

4 Q. If you look at page 39-9, isn't it true that pursuant to  
5 this agreement, Richmond Capital and all persons authorized  
6 under its account, agreed that they would comply with the  
7 Gramm-Leach-Bliley Act?

8 A. Taking the Fifth.

9 Q. Isn't it true that defendant Braun was one such authorized  
10 person under Richmond Capital's account?

11 MR. DiBENEDETTO: Objection. Leading.

12 THE COURT: I think under these circumstances leading  
13 is appropriate, however the frame of the question raises the  
14 inference that the jury may or may not have seen it.  
15 Overruled.

16 You took the Fifth on that?

17 A. Yes, taking the Fifth.

18 Q. If you could look now at page 39-10 and 39-12; is that your  
19 signature at the bottom of 39-12?

20 A. Taking the Fifth.

21 Q. Isn't it true that defendant Braun provided you this second  
22 agreement and directed you to sign?

23 A. Taking the Fifth.

24 Q. Isn't it true that defendant Braun instructed you how to  
25 complete this agreement?

0195fed2

Giardina - Direct

1 A. Taking the Fifth.

2 Q. If you look at page 39-12, isn't it is true that pursuant  
3 to this agreement, Richmond Capital agreed to use information  
4 provided in the Clear reports pursuant to the  
5 Gramm-Leach-Bliley Act?

6 A. Taking the Fifth.

7 Q. Isn't it true that defendant Braun instructed you how to  
8 complete the permissible use section of this agreement?

9 A. Taking the Fifth.

10 Q. I would like to show you what's been marked into evidence  
11 as FTC's Exhibit 40. Isn't it true that this document is an  
12 e-mail that defendant Braun sent to you?

13 A. Taking the Fifth.

14 Q. Isn't it true that in this e-mail defendant Braun is  
15 forwarding to you an e-mail he received from a company called  
16 QuarterSpot?

17 A. Taking the Fifth.

18 Q. Isn't it true that the forwarded e-mail involves an  
19 amendment to a partner agreement between Richmond Capital and  
20 QuarterSpot that clarifies and updates the applicable laws and  
21 regulations?

22 A. Taking the Fifth.

23 Q. Isn't it true in this e-mail defendant Braun is directing  
24 you to sign the amendment?

25 A. Taking the Fifth.

0195fed2

Giardina - Direct

1 Q. If you look at page 40-4 of this exhibit, isn't it true --  
2 and then looking at the Roman numeral II, isn't it true that  
3 this amendment to the partner agreement that defendant Braun  
4 forwarded to you states that Richmond Capital represents and  
5 warrants that it is not subject to any legal proceeding  
6 involving violations of the Gramm-Leach-Bliley Act?

7 A. Taking the Fifth.

8 Q. Isn't it true that you are -- I am done with this  
9 exhibit -- isn't it true that you are the authorized signatory  
10 for Richmond Capital's bank account at Empire State Bank?

11 A. Taking the Fifth.

12 Q. Isn't it true that although you were the authorized  
13 signatory, defendant Braun directed you when to deposit funds  
14 into consumers' bank accounts?

15 A. Taking the Fifth.

16 Q. And isn't it true that although you were the authorized  
17 signatory on Richmond Capital's bank accounts, defendant Braun  
18 directed you how much to deposit into consumers' bank accounts?

19 A. Taking the Fifth.

20 Q. Isn't it true that defendant Braun asked you to sign these  
21 documents Actum Processing, Thompson Reuters, QuarterSpot and  
22 Empire State Bank because defendant Braun was not able to do so  
23 himself?

24 A. Taking the Fifth.

25 Q. Isn't it true that defendant Braun's name does not appear

0195fed2

Giardina - Direct

1 on these documents because, had it been so, it would have  
2 triggered red flags with those entities?

3 A. Taking the Fifth.

4 Q. I would like to show you what's been marked into evidence  
5 already as FTC's Exhibit 68. Isn't it true that this document  
6 is an e-mail from defendant Braun to yourself?

7 A. Taking the Fifth.

8 Q. Isn't it true that in this e-mail defendant Braun is  
9 directing you to fund a deal for a company called Aerodynamics?

10 A. Taking the Fifth.

11 Q. I am showing you what's been already introduced into  
12 evidence as FTC Exhibit 57 and I direct you to the e-mail that  
13 is dated July 21, 2017 at 5:00 p.m. from Stone Funding to Jon  
14 Braun at the top of the page and it says: I want to start  
15 putting money in deals. Should I talk to Rob?

16 Isn't it true that the "Rob" being referenced in this  
17 e-mail is you?

18 A. Taking the Fifth.

19 Q. I'm showing what's already been introduced into evidence as  
20 FTC Exhibit 59, and I direct your attention to the message from  
21 Marcella Rabinovich to Jon Braun that is dated October 18, 2017  
22 at 4:58 where she says: It could help. It's like Clear, but  
23 way more advanced. You should request a free trial -- well,  
24 Rob should request a free trial.

25 Isn't it true that you are the "Rob" being referenced

0195fed2

Giardina - Direct

1 in this e-mail?

2 A. Taking the Fifth.

3 Q. Isn't it true that defendant Braun received tens of  
4 millions of dollars from Richmond Capital's merchant cash  
5 advance business?

6 A. Taking the Fifth.

7 Q. Isn't it true that defendant Braun had his money held  
8 through companies in the names of relatives or friends?

9 A. Taking the Fifth.

10 Q. Isn't it true that Richmond Capital transferred tens of  
11 millions of dollars to a company called Kessef Capital?

12 A. Taking the Fifth.

13 Q. Support it true that Kessef Capital was officially  
14 controlled by a Jacob Braun and Elizer Schwartz?

15 MR. DiBENEDETTO: Objection to the relevance of this.

16 MR. ASHE: Your Honor, it is relevant to one of the  
17 issues that we need to prove -- Mr. Braun's ability to pay --  
18 and it goes to show that he does have access to substantial  
19 funds which --

20 THE COURT: I think in the context of an adverse  
21 inference I think it is too tangential. Sustained. If you can  
22 produce more evidence relating to that we can deal with that  
23 when it happens.

24 BY MR. ASHE:

25 Q. This question, which maybe I should have asked first:

0195fed2

Giardina - Direct

1 Isn't it true that defendant Braun indicated to you that Kessef  
2 Capital was one way in which he got money from Richmond  
3 Capital?

4 MR. DiBENEDETTO: Objection to the relevance of Kessef  
5 Capital.

6 MR. ASHE: Your Honor, I believe the answer to that  
7 does show relevance because if he does take the Fifth it shows  
8 the inference that this was a vehicle by which Mr. Braun was  
9 receiving money which establishes the relevance that you were  
10 asking about.

11 MR. DiBENEDETTO: Your Honor, FTC has not established  
12 proof that Mr. Braun is connected to Kessef Capital.

13 MR. ASHE: Your Honor, we would say there are -- we  
14 believe the evidence that we have put on, including with this  
15 witness would be strong circumstantial evidence that Mr. Braun,  
16 although not nominally on the account, still has control over  
17 this money and therefore could be considered an --

18 THE COURT: You don't seem to have gotten the point  
19 that I made a minute ago which is whether or not I will allow  
20 direct evidence of that is something we will take up  
21 separately, but in terms of whether it is sufficiently germane  
22 on the evidence presently before the jury that they can draw an  
23 adverse inference relating to that from this gentleman's  
24 across-the-board taking of the Fifth is, I think, involves too  
25 much speculation. Sustained.

0195fed2

Giardina - Cross

1 MR. DiBENEDETTO: Thank you.

2 BY MR. ASHE:

3 Q. Isn't it true that when you were in Richmond Capital's  
4 offices you worked in close proximity to defendant Braun?

5 A. Taking the Fifth.

6 Q. Isn't it true that when you were in Richmond Capital's  
7 offices you could hear defendant Braun speaking on the phone to  
8 consumers?

9 A. Taking the Fifth.

10 Q. Isn't it true that you heard defendant Braun threaten one  
11 or more consumers with physical violence if they stopped making  
12 their daily payments?

13 A. Taking the Fifth.

14 MR. ASHE: I don't have any more questions at this  
15 time, your Honor.

16 THE COURT: Cross-examination.

17 CROSS-EXAMINATION

18 BY MR. DiBENEDETTO:

19 Q. Good morning, Mr. Giardina.

20 A. Good morning.

21 Q. Isn't it true that you settled with the FTC in this matter?

22 A. Taking the Fifth.

23 Q. Isn't it true that you failed to fully make the full  
24 payment for settlement in this matter?

25 A. Taking the Fifth.



0195fed2

Giardina - Cross

1 Q. Isn't it correct that you are under criminal investigation  
2 for your involvement with RCG Advances?

3 A. Taking the Fifth.

4 Q. Isn't it true that Mr. Braun never intentionally  
5 overcollected from merchants?

6 A. Taking the Fifth.

7 Q. Isn't it true that Mr. Braun never underfunded merchants?

8 A. Taking the Fifth.

9 Q. Isn't it true that Mr. Braun never threatened physical  
10 violence for failing to make a payment?

11 A. Taking the Fifth.

12 Q. I want to show you what is marked as Plaintiff's Exhibit 38  
13 and go to 38-6. Mr. Giardina, isn't it true that you are the  
14 signor on the bottom of this page?

15 MR. ASHE: Your Honor, objection. Asked and answered.  
16 He has already testified that that is his signature.

17 THE COURT: Overruled.

18 A. Taking the Fifth.

19 Q. Isn't it true that Mr. Braun did not force you to sign this  
20 page?

21 A. Taking the Fifth.

22 Q. Can I show you page 38-7? Isn't it true that you signed  
23 the bottom of this page?

24 A. Taking the Fifth.

25 Q. Isn't it true that Mr. Braun did not force you to sign this

0195fed2

Giardina - Cross

1 page?

2 A. Taking the Fifth.

3 Q. Can we go to 38-8?

4 Isn't it true that you initialed the bottom of this  
5 page?

6 A. Taking the Fifth.

7 Q. Isn't it true that Mr. Braun did not force you to initial  
8 this page?

9 MR. ASHE: Your Honor, I would like to object to this  
10 line of questioning on the grounds that when a witness takes  
11 the Fifth, it is to draw an adverse inference. Counsel here is  
12 trying to draw a positive inference and the law does not allow  
13 the drawing of a positive inference from the invocation of the  
14 Fifth Amendment so it is not a proper line of questioning.

15 THE COURT: No. I think what he is trying to show,  
16 which is fair game for cross-examination, is that the fact that  
17 this defendant is going to be taking the Fifth across the board  
18 on each and every question, may not really be an adequate basis  
19 to draw any adverse inference with respect to Mr. Braun.

20 Overruled.

21 BY MR. DiBENEDETTO:

22 Q. Mr. Giardina, isn't that your initials on the bottom of  
23 this page?

24 A. Taking the Fifth.

25 Q. Isn't it true that Mr. Braun did not force you to initial

0195fed2

Giardina - Cross

1 this page?

2 A. Taking the Fifth.

3 Q. Can we please go to 38-9?

4 Isn't it correct that that is your initials at the  
5 bottom of this page?

6 A. Taking the Fifth.

7 Q. Isn't it correct that Mr. Braun did not force you to  
8 initial this page?

9 A. Taking the Fifth.

10 Q. Can we go to 38-10, please?

11 Isn't it correct that that is your initials at the  
12 bottom of this page?

13 A. Taking the Fifth.

14 Q. Isn't it correct that Mr. Braun did not force you to  
15 initial this page?

16 A. Taking the Fifth.

17 Q. Can we go to 38-11?

18 Isn't it correct, Mr. Giardina, that is your initials  
19 at the bottom of this page?

20 A. Taking the Fifth.

21 Q. Isn't it correct that Mr. Braun did not force you to  
22 initial this page?

23 A. Taking the Fifth.

24 Q. 38-12?

25 Mr. Giardina, isn't it correct that that is your

0195fed2

Giardina - Cross

1 initials at bottom of this page?

2 A. Taking the Fifth.

3 Q. Isn't it correct that Mr. Braun did not force you to  
4 initial this page?

5 A. Taking the Fifth.

6 Q. Next page?

7 Isn't it correct that that is your initials at the  
8 bottom of this page?

9 A. Taking the Fifth.

10 Q. Isn't it correct that Mr. Braun did not force you to  
11 initial this page?

12 A. Taking the Fifth.

13 Q. I now want to show you what is marked as FTC 39. If you go  
14 to 39-9? Isn't it correct, Mr. Giardina, that that is your  
15 signature on the page?

16 A. Taking the Fifth.

17 Q. Isn't it correct that Mr. Braun did not force you to sign  
18 this page?

19 A. Taking the Fifth.

20 Q. If we could go to 39-12?

21 Isn't it correct that that is your signature at the  
22 bottom of the page?

23 A. Taking the Fifth.

24 Q. Isn't it correct that Mr. Braun did not force you to sign  
25 this page?

0195fed2

Giardina - Cross

1 A. Taking the Fifth.

2 Q. Isn't it correct that you were in charge of putting  
3 consumers' debit information into the Actum processing system?

4 A. Taking the Fifth.

5 Q. Isn't it true that Mr. Braun was not responsible for  
6 putting the debit consumers' information into the Actum  
7 processing system?

8 A. Taking the Fifth.

9 Q. Isn't it correct that Mr. Braun never threatened a  
10 consumer?

11 A. Taking the Fifth.

12 Q. Isn't it correct that Mr. Braun never signed a merchant  
13 cash advance agreement?

14 A. Taking the Fifth.

15 Q. At any time it true that Mr. Braun's name is not on RCG's  
16 tax return?

17 A. Taking the Fifth.

18 Q. Isn't correct that Mr. Braun's name is not on the tax  
19 returns for RCG -- I'm sorry -- RAM Capital?

20 A. Taking the Fifth.

21 Q. Isn't it correct that Mr. Braun's name is not on any of the  
22 bank accounts associated with RCG?

23 A. Taking the Fifth.

24 Q. Isn't it correct that Mr. Braun's name is not listed on any  
25 bank accounts for RAM Capital Funding?

0195fed2

Giardina - Redirect

1 A. Taking the Fifth.

2 Q. Isn't it correct that Mr. Braun did not intentionally  
3 overcollect from consumers?

4 A. Taking the Fifth.

5 Q. Isn't it correct that you fired Mr. Braun in 2018?

6 A. Taking the Fifth.

7 MR. DiBENEDETTO: I have no further questions.

8 THE COURT: Any redirect?

9 MR. ASHE: One question, your Honor.

10 REDIRECT EXAMINATION

11 BY MR. ASHE:

12 Q. Mr. Giardina, isn't it true that although you were not  
13 forced to sign any of these documents, you did so on defendant  
14 Braun's express instruction?

15 A. Taking the Fifth.

16 MR. ASHE: Thank you.

17 THE COURT: Anything else?

18 MR. DiBENEDETTO: No, your Honor.

19 THE COURT: Stay here just a minute.

20 Ladies and gentlemen, I think we will give you your  
21 mid-morning break at this time so we will take a 15-minute  
22 break.

23 (Continued on next page)

0195fed2

Giardina - Redirect

1 (Jury not present)

2 THE COURT: Please be seated.

3 So, I am unclear about one thing. First of all, is  
4 Mr. Giardina represented by counsel?

5 MR. ASHE: He is, your Honor.

6 THE COURT: Is the counsel here?

7 MR. IANDOLO: Yes, your Honor.

8 THE COURT: Do you want to identify yourself for the  
9 record, please?

10 MR. IANDOLO: Good morning. Jeremy Iandolo, on behalf  
11 of Rob Giardina.

12 THE COURT: So, I thought that the FTC had indicated  
13 in your initial questions of this witness that he had some form  
14 of cooperation agreement with the FTC.

15 MR. IANDOLO: Your Honor, may I?

16 THE COURT: Yes.

17 MR. IANDOLO: There was a settlement agreement that  
18 was entered into in June of '21, I believe, whereby he had to  
19 pay a sum certain and complete certain satisfactions of  
20 judgments, which were completed. And then he had to cooperate  
21 with the FTC. And under our conversations with counsel for the  
22 FTC, we capitulated to that settlement agreement.

23 THE COURT: Well --

24 MR. IANDOLO: So cooperation --

25 THE COURT: I think by the word "capitulate" you mean

0195fed2

Giardina - Redirect

1 entered into it.

2 MR. IANDOLO: Yes.

3 THE COURT: Now, so does someone have -- was this a  
4 written agreement?

5 MR. IANDOLO: Yes, sir.

6 THE COURT: Does someone have a copy of it?

7 MR. ASHE: Your Honor, it was filed and entered on the  
8 record.

9 THE COURT: That may be but I want to see a copy.

10 MR. ASHE: We are getting a copy of it, your Honor.

11 THE COURT: Thank you. Just hand it to my law clerk.

12 Let me ask the FTC, where in this agreement, if at  
13 all, is an agreement to cooperate?

14 MR. ASHE: The cooperation clause should be maybe  
15 Section 6 or 7. It would be right after the money judgment  
16 section.

17 THE COURT: OK. Hold on.

18 MR. ASHE: I don't recall chapter and verse. I will  
19 say that we did know that Mr. Giardina had ongoing criminal  
20 investigation so our cooperation clause, although requiring  
21 truthful and complete testimony, expressly did not waive any  
22 right he may have under the Fifth Amendment.

23 THE COURT: I am trying to find the wording but you  
24 put your finger on what I am concerned about, which was whether  
25 he had waived his Fifth.



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1 MR. ASHE: He did not, your Honor.

2 THE COURT: All right.

3 MR. ASHE: That was expressly negotiated between  
4 counsel.

5 THE COURT: Well, that answers my question and I will  
6 give this back to my law clerk to give back to plaintiff's  
7 counsel.

8 You are excused. Thank you very much.

9 MR. IANDOLO: Thank you, your Honor.

10 THE COURT: Thank you.

11 (Witness excused)

12 MR. ASHE: It was Section 8.

13 THE COURT: I will take a quick look at it.

14 MR. ASHE: The last sentence.

15 THE COURT: So, for the record, the cooperation  
16 agreement, which is Section VIII of this agreement says -- I  
17 will read the entire paragraph -- "It is further ordered that  
18 settling defendants must fully cooperate with representatives  
19 of the FTC in this case and in any investigation related to or  
20 associated with the transactions or recurrences that are the  
21 subject of the complaint. Settling defendants must provide  
22 truthful and complete information, evidence, and testimony.  
23 Individual settling defendant must appear, and corporate  
24 settling defendant must cause its officers, employees,  
25 representatives, or agents to appear for interviews, discovery

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1 hearings, trials, and any other proceedings that a FTC  
2 representative may reasonably request upon five days' written  
3 notice or other reasonable notice, at such places and times as  
4 a FTC representative may designate, without the service of the  
5 subpoena."

6 And if it ended there I would have said he waived his  
7 Fifth, but the following sentence that appears as the final  
8 sentence in this section: "nothing herein shall be deemed a  
9 waiver by individual settling defendant of any rights he may  
10 have pursuant to the Fifth Amendment to the Constitution of the  
11 United States."

12 Now, far be it for me to inquire whether the FTC would  
13 enter into such a worthless agreement but that agreement speaks  
14 for itself and so he was able to take the Fifth Amendment.

15 Now there is the matter that unfortunately I couldn't  
16 deal with first thing this morning so let's deal with it now.

17 MR. ASHE: Yes, your Honor.

18 As you recall, yesterday morning and yesterday  
19 afternoon we were talking about one of our motions *in limine*  
20 was to --

21 THE COURT: I see someone else in the courtroom. Is  
22 that a witness by any chance?

23 UNIDENTIFIED SPEAKER: No.

24 MR. DiBENEDETTO: He is an attorney, I think, for  
25 Mr. Reich; and he is from our office.

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1 THE COURT: That's fine. Go ahead.

2 MR. ASHE: One of our motions *in limine* was to enter  
3 into the record and be read to the jury certain admissions of  
4 defendant Braun, requests for admissions that he failed to  
5 respond to, and under the Federal Rule 36(a)(3) they are deemed  
6 admitted.

7 THE COURT: Yes. Judge Kaplan originally so held, and  
8 then he cleverly reassigned this case to me -- and eventually I  
9 will forgive him -- and then I so held as well in my summary  
10 judgment.

11 MR. ASHE: As I recall you declined to reconsider that  
12 decision. So, yesterday you had mentioned that you denied that  
13 motion because in reading that portion of your opinion into the  
14 record, you had indicated that the majority of the admissions  
15 that we had wanted to go in were incorporated in that and so  
16 what I said is we reviewed that and we did identify four --

17 THE COURT: Yes.

18 MR. ASHE: So I have, it is specifically from our  
19 second request, request to admit 43, 49, 50 and 51, and these  
20 are directly relevant.

21 THE COURT: Do you have a copy?

22 MR. ASHE: I have a copy. I basically cut and paste  
23 and these are directly relevant admissions from Mr. Braun on  
24 the issue of knowledge. As I recall, in the summary judgment  
25 you said these facts -- a jury could look at these admissions

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Giardina - Redirect

1 and go either way. And so we think it important that at some  
2 point they be read either now or as part of your final  
3 instructions.

4 THE COURT: So, first before we get to the specifics  
5 here, one of the problems I had more generally with a lot of  
6 your proposed admissions was you didn't tell the jury the  
7 relationship between various entities. So, for example, the  
8 first of the admissions you want me to put before the jury  
9 reads: Defendant Braun had knowledge of a client services  
10 application and agreement between Richmond Capital Group, LLC  
11 and Actum Processing. Now, the jury has already heard lots of  
12 references to Richmond Capital Group. I'm not sure they've yet  
13 heard anything of the relationship between Richmond Capital  
14 Group and defendant Braun, so I would think that would be  
15 something you would want to put in. And then I think they have  
16 no idea who Actum Processing is. They don't know whether that  
17 is a borrower or the man in the moon.

18 MR. ASHE: There has already been testimony, your  
19 Honor, from Ms. Kwok, that Actum Processing was the payment  
20 processor. There has been considerable testimony on that. And  
21 Mr. Giardina has also --

22 THE COURT: I'm sorry. I forgot her testimony --

23 MR. ASHE: And Mr. Giardina also, through the adverse  
24 inference, has established that he was directed by Mr. Braun to  
25 sign this document.

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Giardina - Redirect

1 THE COURT: No, no, no, no, no. That's not my  
2 question. My question is what evidence -- this could go back  
3 to things I may have found on summary judgment, I haven't  
4 looked for that but you are invited to look for it, but what  
5 affirmative evidence or findings of the Court previously  
6 established the relationship of Richmond Capital Group either  
7 to RCG, or assuming that is what Richmond Capital Group is,  
8 which it may be, that, and Mr. Braun. So, the undisputed  
9 findings of fact that were already given to the jury taken  
10 straight from my findings refers to RCG Advances, LLC, RAM  
11 Capital, Robert Giardina and so forth. I don't think -- but  
12 maybe I'm wrong -- there is in evidence what the relationship  
13 is between Richmond Capital Group and RCG Advances, although  
14 there is an obvious inference to be drawn from the letters.

15 MR. ASHE: I think Richmond Capital was the d/b/a of  
16 RCG.

17 THE COURT: Yes, so that's the first -- that's my  
18 point. The jury needs to know that.

19 MR. ASHE: Well, Mr. Giardina, through the --

20 THE COURT: No. They need to know it -- they don't  
21 have to draw any inference. And, in fact, though I felt I had  
22 to allow you to call Mr. Giardina, I have deep doubts as to the  
23 probative value of the adverse inference.

24 MR. ASHE: Your Honor, Mr. Reich, who is our next  
25 witness --

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Giardina - Redirect

1 THE COURT: Is going to tell all of this?

2 MR. ASHE: -- will be able to tell us that RCG  
3 Advances was also known as Richmond Capital Group.

4 THE COURT: My point is -- I guess my real point is,  
5 forgive me, I think in every aspect of your presentation you  
6 are going backwards. You start -- I don't know why you didn't  
7 start with Mr. Reich but you start with an expert who knows  
8 absolutely nothing about the underlying facts, just the  
9 calculations, then yes, we get someone who did know something  
10 about it, who it would have been much better to have her first  
11 and him second but, OK, that's your choice. Then we have  
12 Mr. Giardina taking the Fifth when you have sitting there  
13 someone who is not going to be taking the Fifth who is going to  
14 spell out what the jury needs to know and then of course will  
15 be cross-examined on it.

16 So, my point is I think these findings of fact, which  
17 I may well admit, should be admitted after Mr. Reich testifies.

18 MR. ASHE: We do not disagree with that, your Honor.  
19 It does not need to be read now, it can be done, as I said,  
20 even as part of your final instruction when you talk about  
21 admissions.

22 THE COURT: Well, I'm not going to do that but I will  
23 consider and hear from defense counsel, of course, on whether  
24 to admit these four after Mr. Reich testifies.

25 MR. ASHE: The other thing we would point out that you

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Giardina - Redirect

1 have already entered into the record how Mr. Braun exercised  
2 considerable control over all of the defendants and so this was  
3 part of that.

4 THE COURT: I wonder -- you didn't raise any objection  
5 to any of the questions put by defense counsel other than you  
6 felt that the adverse inference didn't apply to what he was  
7 raising, which I explained why I thought it was proper  
8 cross-examination. You never objected to questions that might  
9 have been said to be improper because they contradicted the  
10 undisputed findings of fact to which Mr. Braun had previously  
11 acquiesced. You didn't object to questions like:

12 *Mr. Giardina, did Mr. Braun ever intentionally do X, Y, or Z?*

13 That was a totally improper question because it calls for the  
14 operation of someone else's state of mind, which this witness'  
15 adverse inference or not, he couldn't testify if he wasn't  
16 taking the Fifth about someone else's state of mind. But you  
17 didn't raise any of those objections so we are where we are, we  
18 will take five more minutes. And your next witness is  
19 Mr. Reich?

20 MR. ASHE: Yes.

21 THE COURT: Very good.

22 (Recess)

23 (Continued on next page)

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Reich - Direct

1 (Jury present)

2 THE COURT: Swear in the witness.

3 THE DEPUTY CLERK: Please rise and raise your right  
4 hand.

5 TZVI REICH,

6 called as a witness by the Plaintiff,

7 having been duly sworn, testified as follows:

8 THE DEPUTY CLERK: Please be seated. State your name  
9 and spell it for the record.

10 THE WITNESS: Tzvi Reich. T-Z-V-I R-E-I-C-H.

11 THE COURT: Counsel.

12 DIRECT EXAMINATION

13 BY MS. HEALD:

14 Q. Good morning, Mr. Reich.

15 A. Good morning.

16 Q. First, do you ever go by another name?

17 A. Steve Reich.

18 Q. Were you a defendant in this case?

19 A. Yes.

20 Q. Has the FTC's case against you been resolved?

21 A. Yes.

22 Q. Are you allowed to work in the merchant cash advance  
23 industry currently?

24 A. No.

25 Q. Were you required to pay any money as part of the



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Reich - Direct

1 resolution of your case with the FTC?

2 A. Yes.

3 Q. How much money?

4 A. \$675,000.

5 Q. Did your settlement with the FTC require anything of you  
6 with regard to continued litigation?

7 A. It required me to be a witness here today.

8 Q. Are you testifying today voluntarily?

9 A. No.

10 Q. Are you testifying because the FTC invoked the cooperation  
11 provision of the settlement agreement with you?

12 A. Yes.

13 Q. Mr. Reich, what was your relationship, if any, to RAM  
14 Capital Funding, LLC?

15 A. I was the owner.

16 Q. What was RAM's connection to Richmond Capital Group?

17 A. We would broker deals to them.

18 Q. Was Richmond Capital Group ever called by any other names?

19 A. Viceroy Capital and RAM Capital d/b/a.

20 THE COURT: What was RCG Advances?

21 THE WITNESS: I don't believe that it was affiliated,  
22 as far as I know.

23 THE COURT: I see. Do you have any knowledge of it?

24 THE WITNESS: I think I have seen them in bank  
25 statements but I believe it was an unaffiliated company. And

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Reich - Direct

1 Richmond Capital Group was sometimes referred to as RCG but in  
2 any wire or any time it did a debit it would say Richmond  
3 Capital Group, clearly.

4 THE COURT: Go ahead.

5 BY MS. HEALD:

6 Q. What was the nature of any work that you did personally  
7 with Richmond Capital?

8 A. I would broker deals to them so I would send them different  
9 deals, get offers, and then negotiate with the clients to get  
10 the deals closed, get contracts signed. Stuff like that.

11 Q. What role did the underwriters play with respect to the  
12 merchant cash advance business?

13 A. Can you repeat?

14 Q. What role did the underwriters play with respect to the  
15 merchant cash advance business?

16 A. They look at different things within the deal to see if it  
17 fits the parameters of their underwriting guidelines, whether  
18 it is having enough revenue to support payments or who they  
19 defaulted on in the past and stuff like that.

20 Q. Have you ever worked as an underwriter?

21 A. I have worked with my company, yes.

22 Q. And what was the time period when you operated RAM?

23 A. From 2016 to 2019, I believe.

24 Q. Where was the RAM office located?

25 A. The corporate office was in Lakewood, New Jersey.

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Reich - Direct

1 Q. Where was the office that you went to work in?

2 A. Manhattan.

3 Q. Do you remember its address?

4 A. There were several. I worked at 125 Maiden and 111 John  
5 Street.

6 Q. Where was Richmond Capital's office?

7 A. The same addresses.

8 Q. Was anyone else in the same room as RAM's office space?

9 A. We shared space with Richmond Capital Group.

10 Q. How many days per week were you in that office?

11 A. Five.

12 Q. Did Jonathan Braun work in that office space?

13 A. Yes.

14 Q. How many days a week was Mr. Braun typically in the office?

15 A. Five.

16 Q. Would you recognize Mr. Braun if you saw him?

17 A. Yes.

18 Q. Would you recognize his voice if you heard it?

19 A. Yes.

20 Q. How would you describe Mr. Braun's role at Richmond  
21 Capital?

22 A. Managerial position.

23 Q. Who did you understand to be in charge of Richmond Capital?

24 A. I couldn't hear you.

25 Q. Who did you understand to be in charge of Richmond Capital?

0195fed2

Reich - Direct

1 A. It was Jon Braun and Robert Giardina.

2 Q. From your perspective, who made decisions for Richmond  
3 Capital?

4 A. Jon Braun.

5 Q. Was it your understanding that Richmond Capital employees  
6 viewed Mr. Braun as the boss?

7 A. Yes.

8 Q. Did he instruct Richmond Capital employees about how to do  
9 their jobs?

10 A. Yes.

11 Q. Did he make business decisions for Richmond Capital?

12 A. Yes.

13 Q. Do you consider Mr. Braun to be a smart business person?

14 A. Yes.

15 Q. In his work, did he pay attention to details?

16 A. Yes.

17 Q. Are you aware of Mr. Braun ever placing money with others  
18 rather than keeping it in his name?

19 A. Yes.

20 Q. Mr. Braun, I would like to show you what's been marked for  
21 identification as FTCX 73.

22 A. Have I ever seen this? Yes.

23 Q. That was my next question, is have you ever seen this  
24 document before?

25 A. Yes.

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Reich - Direct

1 Q. And what is it?

2 A. This is the lawsuit against Richmond Capital Group  
3 Advances.

4 Q. And turning to the right-hand side, does that help you  
5 understand what this document is specifically?

6 A. Yes.

7 Q. Could you explain what it is?

8 A. The defendant -- myself's -- objections and responses to  
9 plaintiff's first set of requests for admissions.

10 MS. HEALD: Your Honor, I would like to offer FTC  
11 Exhibit 73 into evidence.

12 MR. DiBENEDETTO: No objection.

13 THE COURT: Received.

14 (Plaintiff's Exhibit 73 received in evidence)

15 BY MS. HEALD:

16 Q. Thank you.

17 I would like to move on to what's been marked for  
18 identification as FTCX 66. Mr. Reich, I should say there are  
19 hard copies of these documents in the binder in front of you,  
20 if you prefer to look there.

21 Mr. Reich, do you recognize this document?

22 A. Yes.

23 Q. What is it?

24 A. It's an e-mail from myself to Jon Braun.

25 MS. HEALD: Your Honor, I would like to offer FTC

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Reich - Direct

1 Exhibit 66 into evidence.

2 MR. DiBENEDETTO: No objection.

3 THE COURT: Received.

4 (Plaintiff's Exhibit 66 received in evidence)

5 BY MS. HEALD:

6 Q. Mr. Reich, do you see the subject line of this e-mail?

7 A. Yes.

8 Q. Could you please read it?

9 A. Forward an e-mail of Aerodynamics.

10 Q. What does Aerodynamics refer to in this message?

11 A. That's the name of a business.

12 Q. Mr. Reich, do you see the top line in your message where  
13 you write: I don't have app. Have Jasmine find the TLO's.

14 A. Yes.

15 Q. When you mentioned "TLO's" in this e-mail what were you  
16 referring to?

17 A. That's the program where people's information, we can look  
18 up any information about them.

19 Q. What sort of information?

20 A. Anything from phone numbers, home addresses, default  
21 judgments, current debt that they have. Stuff like that.

22 Q. Could you describe what the attachments are to this e-mail?

23 A. There are several attachments that are bank statements and  
24 business and corporation docs, probably along with maybe a  
25 driver's license or some other documents that would be a

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Reich - Direct

1 regular submission for a deal.

2 Q. Is a TLO report included here?

3 A. It might be where it says the one with the word "people" in  
4 it, but I'm not sure. I would have to open it to check.

5 Q. Why did you send this e-mail to Mr. Braun?

6 A. I was looking for an offer as a broker.

7 Q. And by offer, can you be more specific what sort of offer  
8 you were looking for?

9 A. I was looking for terms on a merchant cash advance deal  
10 that I could relate to the client and try to make some money as  
11 a broker.

12 Q. Can you explain why you decided to send him these  
13 particular documents in your efforts to get an offer on that  
14 deal?

15 A. Well, first of all, I could see it says no RCG, which means  
16 Richmond Capital Group hasn't funded it before. They obviously  
17 wouldn't fund a deal for me that they funded before for someone  
18 else. I submitted deals to multiple different funders always  
19 looking for offers.

20 Q. Why did you select these documents listed in your e-mail to  
21 send to Mr. Braun?

22 A. This is what they needed for underwriting.

23 Q. In your experience, were TLO reports useful to merchant  
24 cash advance underwriters?

25 A. Yes.

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Reich - Direct

1 Q. What about TLO reports makes them useful to an underwriter?

2 A. TLO or Clear is where they can see if they've defaulted on  
3 recently and if they're paying their bills to other people,  
4 which would help them understand if they're going to pay them.

5 Q. You mentioned Clear. Can you explain what that means?

6 A. It is a similar program to TLO.

7 Q. Next I would like to show you what's been marked for  
8 identification as FTC Exhibit 43. Mr. Reich, do you recognize  
9 this document?

10 A. I believe it is a TLO report.

11 Q. Looking at the second page, are you able to determine the  
12 subject of this report?

13 A. This would be Aerodynamics Incorporated.

14 Q. Did you obtain this document as part of your work as a  
15 broker-dealer at RAM?

16 A. It seems like I did. I don't recall exactly.

17 MS. HEALD: Your Honor, I would like to offer Exhibit  
18 43.

19 MR. DiBENEDETTO: I object to the relevance of this  
20 document to Mr. Braun.

21 MS. HEALD: Your Honor, this document is relevant to  
22 Mr. Braun's knowledge, one of the elements we will prove,  
23 related to civil penalties. Mr. Reich has established that it  
24 was a document seen by underwriters and useful to them.

25 MR. DiBENEDETTO: Your Honor, there is no proof that



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Reich - Direct

1 Mr. Braun has ever seen this document.

2 MS. HEALD: Mr. Reich just testified that he sent  
3 documents relating specifically to this deal to Mr. Braun.

4 THE COURT: I think it is marginally relevant.  
5 Overruled.

6 (Plaintiff's Exhibit 43 received in evidence)

7 BY MS. HEALD:

8 Q. I would now like to move to what's been marked for  
9 identification as FTCX 67. Mr. Reich, do you recognize this  
10 document?

11 A. Yes.

12 Q. And what is it?

13 A. This is a funding e-mail -- sorry. This is an e-mail from  
14 Jon Braun to myself, Robert Giardina, and Michelle Gregg.

15 Q. Do you recall receiving this e-mail?

16 A. Yes.

17 MS. HEALD: I would like to offer FTC Exhibit 67 into  
18 evidence.

19 MR. DiBENEDETTO: No objection.

20 THE COURT: Received.

21 (Plaintiff's Exhibit 67 received in evidence)

22 BY MS. HEALD:

23 Q. Mr. Reich, does this e-mail relate to any particular  
24 merchant?

25 A. Yes.

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Reich - Direct

1 Q. Who is the merchant?

2 A. Joseph DuMouchelle.

3 Q. Can you please read the subject line for the top e-mail in  
4 the chain?

5 A. Please fund wire signed 600K RCG Joseph DuMouchelle fine  
6 and estate jewelry.

7 (Continued on next page)

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O19MFED3

Reich - Direct

1 Q. What did you understand that subject line to mean?

2 A. He was sending out instructions for Robert Giardina to send  
3 out a wire to the merchant with all the details for accounting  
4 to handle it from there.

5 Q. Next I'd like to show what has been marked for  
6 identification as FTCX-41.

7 Mr. Reich, do you recognize this document?

8 A. Yes.

9 Q. What is it?

10 A. It's a TLO report.

11 Q. Does it relate to any particular individual?

12 A. Yes.

13 Q. Who is that individual?

14 A. Joseph DuMouchelle.

15 MS. HEALD: Your Honor, I'd like to offer FTC Exhibit  
16 41?

17 MR. DiBENEDETTO: Your Honor, I am going to object to  
18 the admission of this document. It says it's page 1 of 56. It  
19 doesn't appear that the full comprehensive report is included  
20 as an exhibit.

21 MS. HEALD: Your Honor, we have limited this. Given  
22 the content of personally identifiable information, we have  
23 limited this to the relevant pages.

24 THE COURT: Does someone have the full report?

25 MS. HEALD: We do have a copy of it, yes.

O19MFED3

Reich - Direct

1 THE COURT: Let me see.

2 What portion are you offering?

3 MS. HEALD: We are going to look at just the first two  
4 pages. Would you like me to point me to --

5 THE COURT: No. I have the first two pages.

6 Sustained.

7 Q. Next I'd like to show you, Mr. Reich, what has been marked  
8 for identification as FTC Exhibit 46.

9 Mr. Reich, do you recognize this document?

10 A. Yes.

11 Q. Could you please describe what it is.

12 A. It's an email from John Braun to myself.

13 Q. Do you recall receiving this email?

14 A. Yes.

15 MS. HEALD: Your Honor, I would like to offer FTC  
16 Exhibit 46 into evidence.

17 MR. DiBENEDETTO: Your Honor, I am going to object to  
18 the entrance of this exhibit, as it's outside of the three-year  
19 statute of limitations.

20 THE COURT: I still think it's relevant. Overruled.  
21 Received.

22 (Plaintiff's Exhibit 46 received in evidence)

23 Q. Mr. Reich, do you see the message sent from  
24 status@quarterspot.com and John@RichmondCapitalgroup.com on  
25 October 16, 2016?

O19MFED3

Reich - Direct

1 A. Yes.

2 Q. What is QuarterSpot?

3 A. QuarterSpot is a merchant advance company.

4 Q. Next I would like to turn to what's been marked for  
5 identification as FTCX-48.

6 Mr. Reich, do you recognize this document?

7 A. Yes.

8 Q. What is it?

9 A. An email from John Braun to myself.

10 Q. Do you recall receiving this email?

11 A. Yes.

12 MS. HEALD: Your Honor, I would like to offer FTC  
13 Exhibit 48.

14 MR. DiBENEDETTO: Same objection, your Honor.

15 THE COURT: Same ruling. Received.

16 (Plaintiff's Exhibit 48 received in evidence)

17 Q. Mr. Reich, if you could please take a look at the page  
18 marked FTCX-48-3. If you can please read the email at the  
19 bottom of the page sent by you on February 24, 2017, at 3:26  
20 p.m.

21 A. Merchant knows to the dollar we are 10K over. Please stop  
22 payment. We will deal with refund Monday, or whatever, after I  
23 talk to John.

24 Q. Who are you referring to when you mentioned John?

25 A. John Braun.

O19MFED3

Reich - Direct

1 Q. Next can you please read the email directly above that one  
2 sent by John Braun at 3:28 p.m.

3 A. We can shut off. But this guy can talk to me directly.  
4 John at RAM can be reached, 646-762-1842.

5 Q. Now I'd like to show you what's been marked for  
6 identification as FTCX-50.

7 Mr. Reich, do you recognize this document?

8 A. Yes.

9 Q. What is it?

10 A. An email from myself to John Braun.

11 Q. Do you recall sending this?

12 A. Yes.

13 MS. HEALD: Your Honor, I would like to offer FTC  
14 Exhibit 50 into evidence.

15 MR. DiBENEDETTO: Same objection.

16 THE COURT: Same ruling. Received.

17 (Plaintiff's Exhibit 50 received in evidence)

18 Q. Please turn to the page marked FTCX-50-9, or it will appear  
19 on your screen.

20 Can you please read the message you sent on April 26,  
21 2017 with the time stamp of 14:49:17 towards the middle of the  
22 page.

23 A. BT TWISS 200K, question mark.

24 Q. What is BT TWISS?

25 A. It's the name of a merchant.

O19MFED3

Reich - Direct

1 Q. What did you mean by 200K?

2 A. I was looking for an offer of 200K for funding.

3 Q. Can you next please read the two messages directly below  
4 that one from John Braun, starting with one with the time stamp  
5 of 14:49:32.

6 A. No. Go to hell. Let's just leave on forever and  
7 overcollect. LOL.

8 Q. Next I'd like to show you what's been marked for  
9 identification as FTCX-51.

10 Mr. Reich, do you recognize this document?

11 A. Yes.

12 Q. What is this?

13 A. An email from myself to John Braun.

14 Q. Do you recall sending this email?

15 A. Yes.

16 MS. HEALD: Your Honor, I would like to offer FTC  
17 Exhibit 51 into evidence.

18 MR. DiBENEDETTO: Same objection.

19 THE COURT: Same ruling. Received.

20 (Plaintiff's Exhibit 51 received in evidence)

21 Q. Mr. Reich, could you please read the email in about the  
22 middle of the page with the time stamp of May 2, 2017, at 7:56  
23 a.m., sent by John Braun.

24 A. Who is allowed to decide how much a merchant owes other  
25 than me. I added 5K to their balance and, if we wanted to be

O19MFED3

Reich - Direct

1 generous, give them 2500 discount. We are now out 5,000.

2 Q. Next I'd like to show you what's been marked for  
3 identification as FTCX-53.

4 Mr. Reich, do you recognize this document?

5 A. Yes.

6 Q. What is it?

7 A. An email from John Braun to myself and Stone Funding.

8 Q. Do you recall receiving this email?

9 A. Yes.

10 MS. HEALD: Your Honor, I would like to offer FTC  
11 Exhibit 53 into evidence.

12 MR. DiBENEDETTO: Same objection.

13 THE COURT: Same ruling. Received.

14 (Plaintiff's Exhibit 53 received in evidence)

15 Q. Mr. Reich, can you please read the top email in the chain.

16 A. We also overcollected 3200 on the previous 5K deal. LOL.

17 Q. Now I'd like to show you what has been marked for  
18 identification as FTCX-54.

19 Mr. Reich, do you recognize this document?

20 A. Yes.

21 Q. What is it?

22 A. An email from myself to John Braun.

23 Q. Do you recall sending this email?

24 A. Yes.

25 MS. HEALD: Your Honor, I would like to offer FTC



019MFED3

Reich - Direct

1 Exhibit 54.

2 MR. DiBENEDETTO: No objection.

3 THE COURT: Received.

4 (Plaintiff's Exhibit 54 received in evidence)

5 Q. Mr. Reich, taking a look at the page marked FTCX-54-7,  
6 could you please read two messages from John Braun at the  
7 bottom of the page beginning with the one with the time stamp  
8 2017 0620 9:55:02.

9 A. 31K paying back 60, and I overcollected 16K. LOL.

10 Q. Next I am going to show you what's been marked as FTCX-55.

11 Mr. Reich, do you recognize this?

12 A. Yes.

13 Q. What is it?

14 A. An email from John Braun to Marcella Rabinovich, myself and  
15 Robert Giardina.

16 Q. Do you recall receiving this email from Mr. Braun?

17 A. Yes.

18 MS. HEALD: Your Honor, I would like to offer Exhibit  
19 55 into evidence.

20 MR. DiBENEDETTO: Your Honor, I am going to object to  
21 this email. I believe that Ms. Rabinovich was their attorney  
22 and that this is attorney-client privilege.

23 MS. HEALD: Your Honor, we provided copies of all of  
24 these documents to defense counsel weeks ago, and we heard no  
25 privilege objections. It's also not apparent that there is any

019MFED3

Reich - Direct

1 legal advice contained in this document.

2 THE COURT: Let me see the document.

3 Yes. There is no privilege involved. In addition,  
4 even if there were privilege involved, which there is not, it  
5 was waived by copying other people on the email.

6 Overruled. The document is received.

7 (Plaintiff's Exhibit 55 received in evidence)

8 Q. Mr. Reich, could you please read aloud the forwarded email  
9 in the middle of the page sent -- it says from Sabryna to  
10 Marcella Rabinovich, on July 20, 2017, at 6:08:38 p.m.

11 A. So I'm very confused. The loan was for 25,000 and payback  
12 was 37,475. I paid 25,974 in payments, and the judgment amount  
13 you took from my account was 23,414.30. The total is  
14 49,388.30. So the difference is 11,913.30. So I'm owed  
15 11,913.30 from RAM.

16 Q. Next please read the top message in the chain sent by John  
17 Braun at 6:21:26 p.m.

18 A. Ignore her.

19 Q. Now I'd like to show you what's been marked for  
20 identification as FTCX-56.

21 Mr. Reich, do you recognize this document?

22 A. Yes.

23 Q. What is it?

24 A. It's an email from Mindy Stone to John Braun and myself.

25 Q. Do you recall receiving this email?

019MFED3

Reich - Direct

1 A. Yes.

2 MS. HEALD: Your Honor, I would like to offer FTC  
3 Exhibit 56.

4 MR. DiBENEDETTO: No objection.

5 THE COURT: Received.

6 (Plaintiff's Exhibit 56 received in evidence)

7 Q. Mr. Reich, please read the email on the first page of this  
8 document sent July 21, 2017 at 3:03 p.m. from John Braun.

9 A. You are not requesting it, right. You forward us their  
10 emails like we give a shit. I'll get you a payoff letter and  
11 add some extra too. It causes -- he's annoying as hell.

12 Q. Could you explain, what is a payoff letter?

13 A. When a merchant has a balance that hasn't been paid off in  
14 full through his regular payment schedule and he wants to pay  
15 it off early or another company is going to pay it off, you get  
16 a balance letter that states the amount that he owes as well as  
17 the wire info to complete the deal.

18 Q. What did you understand Mr. Braun to mean when he said he  
19 would add some extra to it?

20 A. That he would inflate the balance.

21 MS. HEALD: Mr. Kotarski, could you display just the  
22 opening image from FTCX-74.

23 Q. Mr. Reich, have you viewed the video accompanying this  
24 image recently?

25 A. Yes.

019MFED3

Reich - Direct

1 Q. Do you recognize what's shown in it?

2 A. Yes.

3 Q. What does it depict?

4 A. Mr. Braun screaming at a merchant.

5 Q. Is the merchant present in the video?

6 A. No.

7 Q. Were you present for the events depicted in the video?

8 A. Yes.

9 Q. Do you recognize where Mr. Braun is located in this video?

10 A. Yes.

11 Q. Where is it?

12 A. 111 John Street.

13 MS. HEALD: Your Honor, I would like to offer FTCX-74  
14 into evidence.

15 MR. DiBENEDETTO: Your Honor, I object to this video  
16 being entered into evidence. This is a damages trial. This  
17 video is Mr. Braun having a conversation with a merchant.  
18 There are no threats made in the video. This is nothing more  
19 than to inflame the jury and prejudice Mr. Braun.

20 MS. HEALD: I disagree about the content of the video.

21 THE COURT: It seems to me, from what I just heard  
22 about this from the witness, that the video bears on intent.

23 Overruled. The video is received.

24 (Plaintiff's Exhibit 74 received in evidence)

25 MS. HEALD: Mr. Kotarski, could you please play the

019MFED3

Reich - Cross

1 video.

2 (Video played)

3 MS. HEALD: I have no further questions at this time.

4 THE COURT: Cross-examination.

5 CROSS-EXAMINATION

6 BY MR. DiBENEDETTO:

7 Q. Good afternoon, Mr. Reich.

8 A. Good afternoon.

9 Q. Why did you record that video of Mr. Braun?

10 A. Because it was unusual for someone to be doing that  
11 consistently, and I don't know.

12 Q. Did Mr. Braun in that video threaten anybody?

13 A. Not directly, no.

14 Q. Who owns RAM Capital Funding?

15 A. The DBA or the LLC?

16 Q. The DBA.

17 A. Richmond Capital Group.

18 Q. Who owns the LLC?

19 A. Me.

20 THE COURT: When you say that he didn't threaten  
21 someone.

22 THE WITNESS: I didn't hear any physical violence.

23 THE COURT: You heard him say he would come spit on  
24 him. Did you hear him say that?

25 THE WITNESS: Yes.

019MFED3

Reich - Cross

1 THE COURT: Isn't that a threat?

2 THE WITNESS: Yes.

3 THE COURT: OK.

4 Go ahead, counsel.

5 BY MR. DiBENEDETTO:

6 Q. Do you recall who the merchant was on the other line of  
7 that call?

8 A. No.

9 Q. Are you aware of any charges pressed against Mr. Braun for  
10 that call?

11 A. No.

12 Q. Are you aware of any charge pressed against Mr. Braun from  
13 any merchants which alleged threats by Mr. Braun?

14 A. I am not sure if there were charges pressed. I know he had  
15 one issue with a fellow in Brooklyn regarding a call. I can't  
16 recall exactly what happened with it, so I can't answer.

17 Q. You're the owner of RAM Capital Funding, correct?

18 A. LLC, yes.

19 Q. About when was that formed?

20 A. 2016.

21 Q. When did you first meet Mr. Braun?

22 A. 2014, I believe.

23 Q. Where did you meet him?

24 A. Either in the offices of Yellowstone Capital or somewhere  
25 on Wall Street.

019MFED3

Reich - Cross

1 Q. When was the first time that you and Mr. Braun started  
2 working together?

3 A. Either late 2014 or early 2015.

4 Q. Did you see Mr. Braun every day?

5 A. At the end of 2016 to 2019, yes.

6 Q. What happened after 2016 that you started seeing Mr. Braun  
7 every day?

8 A. I would work in the same offices as him.

9 Q. Can you explain to me the relationship between RCG and RAM  
10 Capital Funding.

11 A. Richmond Capital Group and RAM. So RAM was a broker. They  
12 set up a similar name, which -- the DBA. So we were able to  
13 broker deals. It's called white labeling, where we were able  
14 to present ourself as a funder when essentially Richmond  
15 Capital was funding the deals, not us.

16 Q. At the beginning of your testimony you testified about RCG  
17 not being connected to RAM Capital, is that correct?

18 A. They asked me about a different RCG. I am not sure if  
19 that's what you are referring to.

20 Q. RCG Advances.

21 A. I don't know. I'm not aware of who those are.

22 Q. You never heard of RCG Advances?

23 A. I believe there was another company that I believe I have  
24 seen in bank statements, but I'm aware of Richmond Capital  
25 Group.

019MFED3

Reich - Cross

1 Q. To what extent are you aware of Richmond Capital Group?

2 A. I used to do business with them. I used to share an office  
3 with them. I knew all the principals.

4 Q. Who were the principals?

5 A. As far as I knew, it was Robert Giardina and John Braun.

6 Q. Isn't it correct that RCG Advances and RAM Capital would  
7 collect consumer's debit information and input it into a  
8 processing system?

9 A. Richmond Capital Group would do that. RAM Capital Funding  
10 LLC never had any ACH processing.

11 Q. Do you recall who was in charge of putting the information  
12 into the ACH processing system?

13 A. Michelle Gregg.

14 Q. Was there anyone else that had access to that?

15 A. I'm unaware. I did not have access to it.

16 Q. Who is Michelle Gregg?

17 A. She worked for Richmond Capital Group.

18 Q. What was her role there?

19 A. She would handle the ACH payments and do some collections.

20 Q. Did you ever see bank statements for RAM Capital or  
21 Richmond Capital Group?

22 A. No.

23 Q. Did you ever see bank statements for RAM Capital Funding?

24 A. The DBA, no.

25 Q. The LLC.



O19MFED3

1 A. Yes. It's my company.

2 Q. Whose name is on it?

3 A. Mine.

4 Q. Solely yours?

5 A. Yes.

6 Q. Who filed tax returns for RAM Capital LLC?

7 A. Myself.

8 Q. Was Mr. Braun's name on any of the tax returns?

9 A. No.

10 MR. DiBENEDETTO: I have no further questions.

11 THE COURT: Any redirect?

12 MS. HEALD: No, your Honor.

13 THE COURT: Thank you very much. You may step down.

14 (Witness excused)

15 THE COURT: Anything else from the FTC?

16 MR. ASHE: No further witnesses, your Honor.

17 THE COURT: Anything from the defense?

18 MR. DiBENEDETTO: Your Honor, the defense rests, but  
19 we do have an application we want to make. I don't know if  
20 your Honor wants it now in front of the jury.

21 THE COURT: No. That probably has to be not in front  
22 of the jury.

23 I think, ladies and gentlemen, as you see, we are  
24 moving with lightning speed. We are going to give you a reward  
25 of an early lunch. Why don't you take your lunch now and come

O19MFED3

1 back at 1:30, an hour and five minutes, but who is counting.

2 (Jury not present)

3 THE COURT: Before we get to any applications from the  
4 defense, do I understand that the plaintiff is either resting  
5 now or is resting but for the question of those four admissions  
6 that you raised earlier?

7 MR. ASHE: But for those admissions.

8 THE COURT: Let's deal with that.

9 First one is defendant Braun had knowledge of the  
10 signed services application agreement between Richmond Capital  
11 Group LLC and Actum Processing.

12 Second is that section 4.2 of the client services  
13 application agreement between Richmond Capital Group LLC and  
14 Actum Processing states that, quote, client agrees to follow  
15 all regulations regarding the use of the company sales of  
16 services and any other applicable regulatory body.

17 I take it the client, though you don't specify it, is  
18 Actum Processing, yes?

19 MR. ASHE: The client in this case would be Richmond  
20 Capital.

21 THE COURT: Don't you think you ought to make that  
22 clear?

23 MR. ASHE: We wanted to quote from the client services  
24 agreement, but we can make that clear.

25 THE COURT: How is the jury going to understand --

O19MFED3

1 MR. ASHE: We can say the client -- since there is  
2 quotes with client, and then like bracket, Richmond Capital.

3 THE COURT: Third one is Section 52 of the client  
4 services application agreement between Richmond Capital Group  
5 LLC and Actum Processing which States that, quote, client does  
6 and at all times during the term of this agreement will operate  
7 its business in strict compliance with all laws and regulations  
8 applicable to the client's business to the highest legal and  
9 ethical standards, including, among others, the Federal Trade  
10 Commission Act of 1914 and the rules and regulations  
11 promulgated thereunder.

12 And the fourth one is a similar thing relating to the  
13 Gramm-Leach-Bliley Act.

14 I take it that the purpose of these four is to  
15 circumstantially attempt to show that Mr. Braun had knowledge  
16 of or had represented indirectly that he had knowledge of those  
17 two acts. Is that the point?

18 MR. ASHE: That's correct, your Honor.

19 THE COURT: Yes.

20 MR. DiBENEDETTO: Your Honor, the attorneys for the  
21 FTC have not established that Mr. Braun had any knowledge of  
22 the applications for Actum. There wasn't any testimony, at  
23 least to my understanding, from Mr. Giardina, nor from  
24 Mr. Reich, that Braun had actual knowledge about this document,  
25 that he had any conversations with Mr. Giardina about signing

019MFED3

1 and initialing these documents.

2 THE COURT: Well, that's a good argument for the jury,  
3 but I don't see -- these are admissions that he made by not  
4 otherwise responding to them or challenging them at the time  
5 when they were called.

6 But I think, just as I was confused, I think you need  
7 to -- do we have a copy of this agreement in evidence?

8 MR. ASHE: Yes, your Honor. The exhibit itself, this  
9 comes from Exhibit 38, and there was already extensive  
10 testimony about that.

11 THE COURT: You can quote from the provisions of the  
12 document if it's already in evidence.

13 MR. ASHE: Now that you mentioned it, your Honor, only  
14 the first one is really the one that is -- you're right. The  
15 last three, you're right, are quoting what's already in  
16 evidence. If your Honor just wants to limit to the first  
17 one --

18 THE COURT: Any objection to that?

19 MR. DiBENEDETTO: Yes, your Honor. Again, this  
20 document has no bearing on Mr. Braun. Mr. Braun's name is not  
21 on one page, whether it's typed into the document, whether it's  
22 a signature or initials. This is a trial against Mr. Braun.

23 THE COURT: But the admission that he made early on in  
24 this case was that he, quote, had knowledge of this agreement.  
25 So I think the first -- tell me what the exhibit number is.

O19MFED3

1 MR. ASHE: It was Exhibit 38, your Honor.

2 THE COURT: Part of the exhibit or all of it?

3 MR. ASHE: Part.

4 THE COURT: What part?

5 MR. ASHE: One moment.

6 MS. HEALD: Starting on page 38-6.

7 THE COURT: I think what we should -- I think I should  
8 simply tell the jury that defendant Braun previously admitted  
9 that he had knowledge of the client services application and  
10 agreement between Richmond Capital Group and Actum Processing  
11 that is part of Exhibit 38. The defense has an objection.

12 But any objection by the government, by the FTC?

13 MR. ASHE: The specific pages were 38-6 through 38-13  
14 inclusive.

15 THE COURT: OK. I will mention that when I tell the  
16 jury. The defense objection is overruled.

17 Now, assuming then the FTC rests after I said what I  
18 just said to the jury, I take it then you're prepared to rest?

19 MR. ASHE: Yes, your Honor.

20 THE COURT: Now let me hear the application from  
21 defense counsel.

22 MR. DiBENEDETTO: Thank you, your Honor.

23 Yesterday, after the jury left, we had a conversation  
24 regarding the exhibits that were admitted into evidence, but  
25 with an objection, that was going to be regarding the Kessef

019MFED3

1 Capital documents. Mr. Reich did not testify that Mr. Braun  
2 had any involvement with Kessef Capital. So all of the  
3 documents --

4 THE COURT: I see your point. Let me ask the FTC,  
5 what about that?

6 MS. HEALD: Mr. Reich did testify that Mr. Braun had a  
7 practice of storing money with others, not in his name.

8 THE COURT: I was amazed, by the way, and I know I've  
9 been sort of picky about compliance with the rules of evidence,  
10 but about the first 25 questions from FTC counsel to the  
11 witness were blatantly leading questions, but there was no  
12 objection raised, so the defense is stuck with them. But the  
13 one you're referring to didn't specifically refer to any  
14 particular company.

15 MS. HEALD: That's correct, your Honor. We still  
16 think there is strong circumstantial evidence related to  
17 Mr. Braun's ability to pay.

18 THE COURT: I agree with the defense. Those  
19 exhibits -- you'll have to go over and put on the record this  
20 afternoon exactly what exhibits and testimony we are talking  
21 about, but I agree the connection has not been made.

22 MR. DiBENEDETTO: Thank you, your Honor.

23 THE COURT: Now, the defense is not presenting any  
24 evidence, correct?

25 MR. DiBENEDETTO: That's correct, your Honor.

O19MFED3

1 THE COURT: Just for the record, I assume the defense  
2 moves at this time for the dismissal of the remaining claims.  
3 You so move?

4 MR. DiBENEDETTO: We do, your Honor.

5 THE COURT: And I would be quite negligent if I didn't  
6 overrule that objection. We are all set.

7 Here is what remains to be done. When they come back  
8 at 1:30, I'll give them one little piece of evidence that we  
9 just referenced about Exhibit 38 and so forth. I'll tell the  
10 jury that. I will ask the FTC to formally get up and rest.  
11 I'll ask defense counsel to formally get up and rest. I will  
12 then excuse the jury until 9:30 tomorrow morning.

13 I will get to you by no later than 2:30 this afternoon  
14 my proposed instructions of law. I will give you the choice.  
15 Either you could stick around, and we will then have a charging  
16 conference here in open court, or, if you prefer, we can have  
17 the charging conference by telephone with a reporter on the  
18 telephone, so it can all be recorded. You don't have to stick  
19 around here if you don't to. But then I will send you later in  
20 the afternoon the final instructions of law.

21 Tomorrow morning, starting at 9:30, we will have  
22 closing arguments and the Court's instructions of law to the  
23 jury, and they will start their deliberations.

24 How long does plaintiff want for its summation?

25 MR. ASHE: Your Honor, certainly pending review of

O19MFED3

1 what those final instructions look like, we estimate about 45  
2 minutes for closing argument, but it could be a little bit  
3 more, a little bit less, depending on would those  
4 instructions --

5 THE COURT: Why don't we say no more than an hour.

6 MR. ASHE: Yes, your Honor.

7 THE COURT: Defense counsel.

8 MR. DiBENEDETTO: Thirty or 45 minutes.

9 THE COURT: Again, I'll give you up to an hour, if you  
10 need it, but I am sure the jury will appreciate if each side is  
11 even less.

12 We will have those two summations, we will take a  
13 short break, we will give my instructions of law, which will  
14 take less than 30 minutes, and then we will start the  
15 deliberations.

16 Counsel overnight needs to prepare a copy of each of  
17 the exhibits, except for the video, to go to the jury. You  
18 need to jointly prepare an index. Consult with each other on  
19 both sides and just prepare a single document that is an index  
20 of all of the exhibits, and then put it in a Redweld, or  
21 something like that, a copy of each of the exhibits.

22 I'll tell the jury that if they want to see the video  
23 again, they can come out, they can let me know through a note,  
24 and we will play it for them here in open court.

25 I'll also, when I send you my chart, I'll also send



O19MFED3

1 you the proposed verdict form, and at the charging conference  
2 you can give me any issues you have with that.

3 I think that's everything.

4 First, let me ask you, do you want to go back to your  
5 office and do the charging conference by telephone, or you want  
6 to remain here and do it in person?

7 MR. DiBENEDETTO: We are here.

8 MR. ASHE: We are here.

9 THE COURT: We will resume with the jury at 1:30.  
10 I'll give them the instruction. You will rest. If I have the  
11 draft charge by then, I'll give it to you right then and there.  
12 If not, you will just stay here in the courtroom, we will get  
13 you the draft charge. We will give you a time to look it over,  
14 and we will call back the reporter and have the charging  
15 conference.

16 MS. HEALD: Your Honor, just to clarify, for copies of  
17 the exhibits for the jury, should it be a single copy for all  
18 of the jury?

19 THE COURT: Yes, a single copy. If they want multiple  
20 copies, they will let me know, but usually they can just pass  
21 it around.

22 Anything else we need to discuss?

23 MR. ASHE: No, your Honor.

24 THE COURT: We will see you at 1:30.

25 (Luncheon recess)

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A F T E R N O O N   S E S S I O N

1:40 p.m.

(Jury present)

THE COURT: So, ladies and gentlemen, in Plaintiff's Exhibit 38, which you had which was received earlier, there is an agreement at pages 6 to 13 of that exhibit which is a client services agreement between Richmond Capital and something called Actum Processing, which is a processor, and I want to instruct you that at an earlier stage in this case the defendant, Mr. Braun, admitted that he had knowledge of that agreement. The relevance of that will I think be argued by counsel in their closing arguments, but I just want you to know that he has admitted that he had knowledge of that particular agreement.

So, does the FTC rest?

MR. ASHE: Yes, your Honor; the FTC rests.

THE COURT: Does defendant rest?

MR. DiBENEDETTO: The defendant rests, your Honor.

THE COURT: So that concludes the taking of evidence in this case. We have moved with lightning speed thanks to the good work of counsel, so here is the story:

Both because there are legal issues I have to take up with counsel and also because the weather later this afternoon is supposed to be really nasty, I'm going to let you go now, but you need to return promptly at 9:30 tomorrow. At 9:30

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1 tomorrow we will first have the closing arguments of counsel,  
2 each side is being given one hour, they may not need a full  
3 hour but they have each up to one hour, so that will take us to  
4 about 11:30, and then we will take a 15-minute break, and then  
5 there will be my instructions of law which will take about a  
6 half hour, and I will both read them but I will also give you  
7 copies so you can take them into the jury room. So, that will  
8 take us to about 12:15. And then the case will be yours to  
9 deliberate. To make it easier for you we will have lunch  
10 brought in around 1:00, and we will give you a menu earlier so  
11 you can pick your lunch. And, you can take as little or as  
12 long as you need for your deliberations. If you haven't  
13 completed your deliberations by 4:30 tomorrow, then you will go  
14 home and come back at 9:30 the next day.

15 So, anyway, I thank you again for your promptness and  
16 have a very good evening. I hope the weather won't be as bad  
17 as they're predicting but at least it will be rain, not snow.  
18 We will see you at 9:30 tomorrow morning.

19 (Continued on next page)  
20  
21  
22  
23  
24  
25

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1 (Jury not present)

2 THE COURT: So let's put some time on. I will have my  
3 draft charge and draft verdict form for you by 2:00, so just  
4 stay here in the courtroom until 2:00. And then how much time  
5 do you want to look it over? Half hour? 45 minutes? Does  
6 that work for counsel.

7 MR. DiBENEDETTO: Yes, Judge.

8 THE COURT: So we will reconvene at 2:30 and have the  
9 charging conference at that time. So, I think that's  
10 everything.

11 MR. DiBENEDETTO: Your Honor, you asked me during the  
12 lunch break to list out the exhibits to be excluded from  
13 evidence relating to Kessef Capital.

14 THE COURT: I'm sorry?

15 MR. DiBENEDETTO: You asked me during the break to  
16 pinpoint the exhibits to be removed.

17 THE COURT: Thank you very much.

18 MR. DiBENEDETTO: I have them.

19 THE COURT: Why don't you read them for the record.

20 MR. DiBENEDETTO: Plaintiff's Exhibit 45, Plaintiff's  
21 Exhibit 69, Plaintiff's Exhibit 70, Plaintiff's Exhibit 71, and  
22 Plaintiff's Exhibit 72.

23 THE COURT: I'm sorry I let the jury go, I should have  
24 told them about that, but I will tell them about that first  
25 thing tomorrow morning. Just remind me before they come in.

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MR. DiBENEDETTO: I will, your Honor. Thank you.

MS. HEALD: Your Honor, Plaintiff's Exhibit 45 were bank records for Richmond Capital.

THE COURT: Oh, so that's different. Why don't, between now and 2:00 when I come back with the charge, we won't need the reporter until 2:30. Try to work it out and make sure we have a definitive list of what is being excluded and what is not and we will put it on the record at 2:30.

MS. HEALD: Thank you.

(Recess)

THE COURT: What I want with respect to the draft instructions of law that you previously received is if you have an objection or an addition, tell me specifically the words that you would like in place of any of your objections. So, we will start with the general instructions 1 through 7, these are basically my standard instructions but any objections to anything in 1 through 7 from the FTC?

MR. ASHE: No, your Honor.

THE COURT: From the defense?

MR. DiBENEDETTO: No, your Honor.

THE COURT: Very good.

MR. ASHE: Oh, I apologize, your Honor. What you had written, there is one addition. So there is no objection but there is an addition.

THE COURT: What is the addition?

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1 MR. ASHE: Because Mr. Giardina took the Fifth  
2 Amendment we would request an instruction related to  
3 inferences.

4 THE COURT: Yes. I thought about that but I think I  
5 gave the jury more than enough and it is not like they have to  
6 remember back days and days, they heard it today.

7 MR. ASHE: OK.

8 THE COURT: So I think they have the instruction. If  
9 they send out a note about that for any reason I will  
10 reinstruct them, but I don't --

11 MR. ASHE: In closing may I tell them they can take  
12 the adverse inference?

13 THE COURT: Yes.

14 MR. ASHE: OK. Then we are fine. We have no further  
15 objections or additions to the general instructions.

16 THE COURT: So, with respect to the first of the three  
17 substantive instructions, instruction no. 8, which is just  
18 basically an overview, any objections or additions to that  
19 instruction before we get to the more specific ones? Anything  
20 further, anything from the FTC?

21 MR. ASHE: Not on instruction 8.

22 THE COURT: Anything from the defense?

23 MR. DiBENEDETTO: No, your Honor.

24 THE COURT: Now we get to the most interesting parts,  
25 9 and 10. So, on 9, anything from the FTC?

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1 MR. ASHE: Yes, your Honor.

2 First, I think it was just housekeeping on the first  
3 paragraph of instruction 9, it is underfunded meaning the  
4 borrower received less and then overcollected meaning the  
5 borrower paid more.

6 THE COURT: Oh yes, yes. I got those reversed. Yes.  
7 Thank you very much.

8 Oh no, no, no. That's not right. Overcollected,  
9 meaning the borrower received less money than what the borrower  
10 was supposed to receive, or underfunded meaning that Mr. Braun  
11 and his co-defendants took more money from borrowers than what  
12 the borrower owed.

13 What is the problem with that?

14 MR. ASHE: Underfunded is that the borrower received  
15 less money up front and we have it overcollected. So the  
16 underfunded is, those are the situations where the borrower  
17 received less.

18 THE COURT: You are right. You are exactly right. I  
19 got them mixed up. So, in particular, the FTC seeking monetary  
20 damages for any MCA agreements as to which Mr. Braun and his  
21 co-defendants either underfunded, meaning that the borrower  
22 received less money than what the borrower was supposed to  
23 receive, or overcollected, meaning that Mr. Braun's  
24 co-defendants took more money from the borrowers than what the  
25 borrowers owed.

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1 MR. ASHE: Yes.

2 THE COURT: Thank you very much for catching that. My  
3 mistake.

4 MR. ASHE: The other comment we would make is in the  
5 second paragraph there is two issues in the sentence that  
6 begins: However, the FTC may prove such injury by showing that  
7 Mr. Braun and his co-defendants made material  
8 misrepresentations.

9 As the Court has previously read to the jury that has  
10 already been established and the same of a kind that a  
11 reasonable person would rely upon. But, more fundamentally, we  
12 understand that this whole language of showing material  
13 representations widely disseminated of a kind that would be  
14 relied upon, that is in a situation where the FTC is trying to  
15 establish a presumption that every consumer relied on the  
16 defendant's misrepresentations and those are situations where  
17 the damages the FTC is seeking is every dollar that the  
18 defendants take, and the courts say you don't have to show  
19 actual reliance from every single consumer you do this  
20 presumption. Here, the evidence that we have presented and the  
21 damage that we are seeking is only the violations of the law  
22 relating to the undercollection and underfunding which is  
23 specific numbers. So, we are not seeking to recover every  
24 dollar that the defendants took from every deal because, as the  
25 experts showed, there were plenty of deals where there was no



0195fed4

1 overcollection and there was no underfunding and so therefore  
2 that language is not --

3 THE COURT: OK. I think you are making a good point  
4 but what is the language you request?

5 MR. ASHE: We would have it say the FTC bears the  
6 burden of proving these damages by a preponderance of the  
7 evidence. To meet this burden, the FTC must show the amount of  
8 damages -- I guess if I could borrow the language from our  
9 proposed instruction, it would be the second paragraph of our  
10 proposed instruction 19 where we say --

11 (Continued on next page)

O19MFED5

1 THE COURT: Read it to me.

2 MR. ASHE: The FTC has the burden of proving by a  
3 preponderance of the evidence the amount of consumer harm that  
4 resulted from these violations of the GLB Act; specifically,  
5 the amount of consumer harm caused by defendants collecting  
6 more from consumers than what was set forth in the merchant  
7 cash agreements and the amount of consumer harm caused by  
8 defendants collecting more from consumers than what was set  
9 forth in the merchant cash advance agreements, and the amount  
10 of consumer harm caused by defendants funding less to consumers  
11 than what was set forth in the MCA agreements, and then the FTC  
12 can meet this burden by making a reasonable estimate and going  
13 into that language. Then the rest of it. Once the FTC makes  
14 that reasonable estimate, the burden shifts.

15 This is the accurate reflection of the law. We are  
16 not seeking every dollar that the defendants --

17 THE COURT: Your instruction.

18 MR. ASHE: It would be the second paragraph.

19 THE COURT: Of instruction 19.

20 MR. ASHE: Posttrial instruction 19. Basically the  
21 second paragraph.

22 The other thing that we would like is just a reminder,  
23 because civil penalties involves knowledge, a reminder that  
24 there is no knowledge. I know you had said that before, but we  
25 think it's important that the jury be reminded that the

019MFED5

1 knowledge element doesn't apply to the consumer harm judgment.

2 That's our second paragraph.

3 THE COURT: Hold on.

4 Here is how I would revise it. This is all subject to  
5 hearing in a minute from defense counsel. I am going to read  
6 you the entire instruction slowly as I have now revised it.

7 The FTC is seeking what are called damages for the  
8 monetary harm that the misrepresentations caused to borrowers.  
9 In particular, the FTC is seeking monetary damages for those  
10 MCA agreements as to which Mr. Braun and his codefendants  
11 either underfunded, meaning that the borrower received less  
12 money than what the borrower was supposed to receive, or  
13 overcollected, meaning that Mr. Braun and his codefendants took  
14 more money from borrowers than what the borrowers owed. Then a  
15 new sentence: As you know, it has already been established at  
16 an earlier phase of this case that such misrepresentations were  
17 made and that Mr. Braun is legally liable for his role relating  
18 thereto.

19 We go back to the next sentence: However, because of  
20 what is called a statute of limitations, the damages are  
21 limited to the amount of such monetary harm that occurred  
22 during the three-year period between June 10, 2017 and June 10,  
23 2020.

24 Then strike the first six lines of the next paragraph  
25 and substitute the following: As to the amount of damages

019MFED5

1 resulting from these misrepresentations -- and pick up the word  
2 misrepresentations from the seventh line -- as to the amount of  
3 damages resulting from these misrepresentations, the FTC can  
4 meet its burden of proof to show the amount of monetary damages  
5 by putting forward a reasonable estimate of the harm to  
6 borrowers. Once the FTC puts forward evidence of a reasonable  
7 estimate, the burden shifts to Mr. Braun to show why the FTC's  
8 reasonable estimate is inaccurate or unreasonable.

9 Let me read that in its entirety one more time to make  
10 sure you all have it, and then I'll hear any further objections  
11 or additions.

12 The FTC is seeking what are called damages for the  
13 monetary harm misrepresentations caused to borrowers. In  
14 particular, the FTC is seeking monetary damages for those MCA  
15 agreements as to which Mr. Braun and his codefendants either  
16 underfunded -- strike the words as to -- those MCA agreements  
17 which Mr. Braun and his codefendants underfunded, meaning that  
18 the borrower received less money than what the borrower was  
19 supposed to receive or overcollected, meaning that Mr. Braun  
20 and his codefendants took more money from borrowers than what  
21 the borrowers owed.

22 As you know, it has already been established at an  
23 earlier phase of this case that such misrepresentations were  
24 made and that Mr. Braun is legally liable for his role relating  
25 thereto. However, because of what is called a statute of

O19MFED5

1 limitations, the damages are limited to the amount of such  
2 monetary harm that occurred during the three-year period  
3 between June 10, 2017 and June 10, 2020.

4 And as to the amount of damages resulting from these  
5 misrepresentations, the FTC can meet its burden of proof to  
6 show the amount of monetary damages by putting forward a  
7 reasonable estimate of the harm to borrowers. Once the FTC  
8 puts forward evidence of a reasonable estimate, the burden  
9 shifts to Mr. Braun to show why the FTC's reasonable estimate  
10 is inaccurate or unreasonable.

11 Any problems with that by the FTC?

12 MR. ASHE: That instruction as edited is acceptable,  
13 your Honor.

14 THE COURT: By the defense.

15 MR. DiBENEDETTO: We do have an objection.  
16 Specifically in the first paragraph, where it mentions  
17 Mr. Braun and his codefendants overcollected or underfunded, we  
18 believe that it should just be Mr. Braun. The corporate  
19 defendants settled this matter. The other individual  
20 defendants settled this matter. And the damages at this trial  
21 is solely related to Mr. Braun, not to any wrongdoing by the  
22 other codefendants in this case. For the jury to have an  
23 instruction that says codefendants may influence the jury in a  
24 different direction from the real crux issue of this case,  
25 which is solely Mr. Braun.

019MFED5

1 THE COURT: I think the sentence that I added about  
2 he's legally liable for his role is what was decided on summary  
3 judgment and is the case here. He is not responsible for any  
4 underfunding or overcollecting that he had no role in. But if  
5 his role was that he controlled everything that was going on,  
6 that he approved everything that was going on, etc., etc., all  
7 of which was the subject of part of my ruling on summary  
8 judgment, then he's liable.

9 MR. DiBENEDETTO: I understand that, your Honor, but  
10 part of the issue is that the statute of limitations is for the  
11 three-year period from June 2017 to June 2020, and the  
12 testimony showed that Mr. Braun was fired in December 2018. So  
13 arguably half of the time frame that FTC is looking for damages  
14 includes a time frame in which Mr. Braun was not employed by  
15 any of the corporate defendants.

16 THE COURT: By the way, the only question I heard  
17 about that -- I think that's a point I'm glad you raised  
18 because I wanted to inquire about this. Maybe I missed it.  
19 The only question I heard was simply as part of the questions  
20 as to which Mr. Giardina took the Fifth. I don't know that  
21 there is any affirmative evidence of his being fired on that  
22 date or being fired, period.

23 What is the evidence of that?

24 MR. DiBENEDETTO: Other than the testimony we have of  
25 Mr. Giardina asserting the Fifth Amendment to that question,

019MFED5

1 there isn't any other direct evidence linking Mr. Braun's  
2 firing to 2018.

3 THE COURT: I don't think we have even heard that he  
4 was fired by any direct evidence.

5 Let me ask the government, assuming for the sake of  
6 argument that there was evidence that he was fired on that day,  
7 what do you say? How does that affect his responsibility for  
8 damages thereafter?

9 MR. ASHE: The damages that we are seeking, it doesn't  
10 affect. There were documents never entered into evidence that  
11 suggest that he may have been fired in December of 2018.  
12 Assuming that's accurate, as Ms. Kwok testified, the last deal  
13 from the review of the Actum transaction database was November  
14 2018, which was a month before. So all of the damages are  
15 within the period of time when he was still employed, and we  
16 are not -- even though the period goes all the way to 2020, we  
17 are really for damages going to 2017, June 10, 2017, until that  
18 last deal which came in in November 2018.

19 THE COURT: Which came in when?

20 MR. ASHE: November of 2018. That was Ms. Kwok's  
21 testimony, that based on the Actum database, the last  
22 transaction came in sometime in November 2018. It doesn't  
23 affect --

24 THE COURT: Should we add then to the sentence about  
25 the statute of limitations. However, because of what is called

O19MFED5

1 a statute of limitations, the damages are limited to the amount  
2 of such monetary harm that occurred during the three-year  
3 period between June 10, 2017 and June 10, 2020. Indeed, the  
4 FTC is only seeking damages for such harms as occurred between  
5 June 10, 2017 and, what is it, November 2018?

6 MR. ASHE: I don't remember the exact date, your  
7 Honor. We have actually -- just for the sake of argument, we  
8 have not conceded he was even fired.

9 THE COURT: I understand. And I am not sure that's in  
10 evidence.

11 MR. ASHE: We would think that the instruction as  
12 written -- and they can make their argument, if they want to  
13 make it.

14 THE COURT: No, no, no. I think if you are only  
15 claiming between -- in fairness to the defense, if you're only  
16 claiming through such and such a time, and it will bear on  
17 whatever arguments are going to be made in this regard, he may  
18 still argue -- let's say it's November. He may still say:  
19 Hey, you can infer from the adverse inference that it was July  
20 that he was fired, so he's not responsible for August,  
21 September, October, or November. I may have some issues to  
22 raise about that argument, but can't you tell me what the final  
23 date is?

24 MR. ASHE: We have to go into the database. I think  
25 the witness said November. She was basing that on memory.



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1 THE COURT: OK. Why don't you do this. Why don't you  
2 check that tonight, but at least for now I'll put down  
3 November.

4 Having made that change, let me go back to defense  
5 counsel. There was no affirmative evidence of his being fired,  
6 period, let alone on a particular date. I think you can make  
7 the argument: Ladies and gentlemen, you heard Mr. Giardina  
8 take the Fifth on the question of whether he was -- Mr. Braun  
9 was fired in July of 2018. You didn't hear anything from the  
10 FTC about this other than their limiting their damages through  
11 November. You may find that there is insufficient evidence to  
12 believe that Mr. Braun was still involved at that late date,  
13 something along those lines. I think that would be the most  
14 you could do.

15 MR. DiBENEDETTO: I understand.

16 THE COURT: Let's move on then to instruction number  
17 19.

18 Any objections or additions from the FTC?

19 MR. ASHE: One is just a statutory comment. They are  
20 both actually statutory comments.

21 Right now the penalty -- the amount for violation is  
22 50,120. The White House has instructed agencies to revise  
23 those for 2024. The FTC has not yet published that number.  
24 But if it should publish it between now and when this goes to  
25 the jury --

O19MFED5

1 THE COURT: Tomorrow morning.

2 MR. ASHE: Tomorrow morning.

3 Usually, they publish it the first Monday of January,  
4 and we are surprised it hasn't gone out.

5 THE COURT: If that happens, you will let me know.

6 MR. ASHE: We will let you know.

7 The second one is just at the very bottom of page 13,  
8 the factor of culpability and then such other factors. We do  
9 note that the statute -- I guess my question is, can we talk  
10 about -- if we have evidence, can we talk about the other  
11 factors?

12 THE COURT: Yes.

13 MR. ASHE: Or are we limited?

14 THE COURT: No. You can talk about the other factors.  
15 As I say, such other factors.

16 MR. ASHE: That is, in fact, the five factors.

17 THE COURT: I want to repeat why I have limited it in  
18 this regard because this is something I did, did with malice  
19 and forethought.

20 If the jury were making the final determination on the  
21 amount of civil penalties, then I think I would have to list  
22 all five factors, which includes, however, the catch-all other  
23 such factors but includes things like ability to pay and things  
24 like that. And probably in that case I would have considered  
25 possibly admitting his prior conviction as well.

019MFED5

1 But since it is just an advisory opinion, what I need  
2 from this jury most essentially is one thing that is not an  
3 advisory opinion, which is, did he act knowingly or not.  
4 That's why it's a separate question in the verdict form.

5 If they can conclude that, it would be useful to me to  
6 know what they thought was appropriate penalties based just on  
7 the misconduct that has been brought to their attention and not  
8 ability to pay, not prior convictions, not any of this other  
9 stuff. And, in fact, if it wasn't cabined in that way, it  
10 seems to me their advice would be of less value to the Court in  
11 making my final decision. That's why I cut out all those other  
12 factors.

13 You are free, both sides are free to make mention of  
14 those, not by saying the statute says, but just saying:  
15 Another factor you may want to consider is such and such, but  
16 only as to stuff that's in evidence. But that's the reason I  
17 shaped it in the way I did.

18 MR. ASHE: With that clarification, the FTC doesn't  
19 have any objection to the instruction as written.

20 THE COURT: Any objections from defendants?

21 MR. DiBENEDETTO: Yes, your Honor.

22 I feel like I have said this a lot this trial, but I  
23 have the same objection as relating to instruction number 9.

24 But instruction number 10 in the third paragraph on  
25 the second line where it says, Between June 10, 2015 and now

O19MFED5

1 after the conversation --

2 THE COURT: It's now -- because this is the five year.

3 MR. DiBENEDETTO: We believe it should be June 10,  
4 2015 and November 2018.

5 THE COURT: Let me reword it. Hold on a minute.

6 I would reword the first sentence of the third  
7 paragraph to read as follows: Here, because of a different  
8 statute of limitations, the FTC is entitled to seek up to  
9 \$50,120 for each violation of the GLB Act that occurred between  
10 June 10, 2015 and June 10, 2020, but in fact the FTC is only  
11 seeking such penalties through November 2018. OK.

12 MR. DiBENEDETTO: Thank you, your Honor.

13 THE COURT: Of course you have your argument about  
14 July versus November.

15 Anything else from defense?

16 MR. DiBENEDETTO: No, your Honor.

17 THE COURT: Anything regarding the final concluding  
18 instructions, which, again, are my standard instructions?

19 MR. ASHE: Not from the FTC.

20 MR. DiBENEDETTO: Not from defense.

21 THE COURT: I will get you the revised charge sometime  
22 late this afternoon and email it to both sides.

23 So the last thing is the verdict form, if I can find  
24 where I put my copy. There. I put my copy in the hands of my  
25 law clerk.

O19MFED5

Any problem with the verdict form from the FTC?

MR. ASHE: No, your Honor.

THE COURT: From the defense.

MR. DiBENEDETTO: No, your Honor.

THE COURT: Very good.

I will send you the final of that tonight as well or later this afternoon.

Very good.

MR. ASHE: Your Honor, one housekeeping matter.

At the very end, counsel and I, on that Exhibit 45, we have agreed how to remove just -- the exhibit will go in, but we are going to remove those pages that made reference to Kessef.

THE COURT: Be sure to remind me to tell the jury first thing tomorrow before we start summations that certain exhibits relating to Kessef Capital have now been removed and should not be part of your consideration in any respect.

Very good.

(Adjourned to January 10, 2024, at 9:30 a.m.)

## INDEX OF EXAMINATION

Examination of:	Page
-----------------	------

ELIZABETH KWOK

Direct By Ms. Heald . . . . .	166
-------------------------------	-----

Cross By Mr. DiBenedetto . . . . .	174
------------------------------------	-----

ROBERT GIARDINA

Direct By Mr. Ashe . . . . .	189
------------------------------	-----

Cross By Mr. DiBenedetto . . . . .	203
------------------------------------	-----

Redirect By Mr. Ashe . . . . .	209
--------------------------------	-----

TZVI REICH

Direct By Ms. Heald . . . . .	219
-------------------------------	-----

Cross By Mr. DiBenedetto . . . . .	240
------------------------------------	-----

## PLAINTIFF EXHIBITS

<u>Exhibit No.</u>	<u>Received</u>
--------------------	-----------------

59 . . . . .	166
--------------	-----

75 . . . . .	168
--------------	-----

44 . . . . .	170
--------------	-----

73 . . . . .	224
--------------	-----

66 . . . . .	225
--------------	-----

43 . . . . .	228
--------------	-----

67 . . . . .	228
--------------	-----

46 . . . . .	231
--------------	-----

48 . . . . .	232
--------------	-----

50 . . . . .	233
--------------	-----

51 . . . . .	234
--------------	-----

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